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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, ET AL.,

Appellants,

—v.—

JUDITH JAVA, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT FILED AUGUST 7, 1970
PROBABLE JURISDICTION NOTED OCTOBER 26, 1970

JUDITH JAVA ET AL. VS. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL.

DATE 1969		PROCEEDINGS
Nov.	10	1. Filed Complaint. Iss. 3 Orig. Summons'
	10	2. Filed Ord. for private process service (James M. Klein) (Clerk)
	10	3. Filed pltfs. brief in support of mo. for prelim. inj.
	10	4. Filed pltfs. notice of mo. for prelim. inj. (un-noticed)
	10	5. Filed pltfs. brief in support of mo. for tro.
	10	6. Filed pltfs. notice of mo. for tro. (un-noticed)
	10	7. Filed pltfs. affidavit in support of mo. for tro. & prelim. inj. (Judith Java)
	10	8. Filed pltfs. affidavit in support of mo. for tro. & prelim. inj. (Ralph Warn)
	10	9. Filed pltfs. affidavit (Carroll H. Hudson) in support of mo. for tro. & prem. inj.
	12	Ord. application for tro. denied. (Wollenberg)
	12	10. Filed summons on ret., exec. as to Ramon L. Jimenez, 11-10-69.
	12	11. Filed summons on ret., exec. as to Esther Perry, 11-12-69.
	12	12. Filed summons on ret., exec. as to Asher Rubin, 11-10-69.
	17	13. Filed notification & cert. to Judge Chambers requesting three judge court. (Wollenberg)
	19	14. Filed pltfs. amendment to complaint.
	21	15. Filed ord. designating three judge court, Judges Jertberg, Wollenberg & Zirpoli.
Dec.	4	16. Filed summons on ret., exec. 11-26-69.
	5	17. Filed defts. ans. to complaint.
	5	18. Filed defts. mo. to dismiss complaint
	22	19. Filed defts. ans. to interrogs.

DATE 1970		PROCEEDINGS
Jan.	8	Clerk's notice of 3 Judge Court hrg. on defts. mo. to dismiss, March 20, 1970 at 1:30 P.M. in Courtroom No. 7. (TJW)
Mar.	4	20. Filed defts. notice of taking depos. of Judith Java.
	3	19A. Filed pltfs. brief in oppos. to defts. mo. to dismiss & pltfs. brief in reply to defts. ans.
	9	21. Filed affidavit of James M. Klein.
	18	Issued summons.
	20	Ord. aft. hrg., defts. mo. to dismiss submitted. (Wollenberg)
	27	21-A. Filed Civil Subp. return executed as to JoAnn Cohn on Mar. 18-70
Apr.	14	22. Filed stip. re payment of unemployment compensation.
May	13	23. Filed Deposition of Judith Hanet Jones Java, March 16, 1970
	14	24. Filed order granting mo. for Preliminary Injunction, Execution of this order stayed 10 days from filing or upon proper mo. & showing by defense. (Judges Jertberg, Zirpoli & Wollenberg)
Jun.	12	25. Filed notice of Appeal to the Supreme Court of the U.S. by Defts.
	16	Mailed Clerk's notice of filing appeal
	24	26. Filed letter from Deputy Attorney General Asher Rubin "stating that Reporter's Transcript will be necessary for the Appeal"
	25	Made, mailed Record on Appeal to U.S. Supreme Court by Certified Mail. Receipt No. 224358
	29	27. Filed Receipt of Record on Appeal from 9th CCA
July	14	28. Filed Receipt of Record on Appeal from Clerk, Supreme Court US
	31	29. Filed Affidavit of Nicolo Pino

DATE 1970		PROCEEDINGS
Aug.	5	Made, Mailed 1st Supplemental Record on Appeal to U.S. Supreme Court by Certified Mail. Receipt No. 224355
	11	30. Filed Receipt of Suppl. Record Dated Aug. 7-70
Sept.	18	31. Filed Letter from Stephen Berzon, Notice of change of address

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Filed Nov. 10 1969.

United States District Court
Northern District of California

Civil Action Civil Rights No. C-69 350

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield as Director of the California Department of Human Resources Development; Esther Perry, as Manager of the Pittsburg, California branch of the California Department of Human Resources Development; Ramon L. Jimenez as Manager of the Richmond, California branch of the California Department of Human Resources Development,
Defendants,

COMPLAINT FOR THREE JUDGE COURT, DECLARATORY RELIEF AND INJUNCTION

I.

This is a civil action for injunctive and declaratory relief authorized by Title 42 USC 1983, Title 42 USC 501 et seq.,

and Title 28 USC 2201 and 2202 to secure rights, privileges and immunities guaranteed by the Fourteenth Amendment to the United States Constitution and by the Social Security Act, 42 USC 503 (a) (1) and (3). This action seeks to declare Section 1335 of the California Unemployment Insurance Code Unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and to declare section 1335 of the California Unemployment Insurance Code to be in violation of Sections 503 (a) (1) and 503 (a) (3) of the Social Security Act, 42 USC 503 (a) (1) and (3). This action further seeks to enjoin the enforcement of Section 1335 of the California Unemployment Insurance Code against plaintiffs and the class they represent.

II.

This is a proper case for determination by a three judge court pursuant to 28 USC 2281 since it seeks an injunction to restrain the defendant officers of the State of California from the enforcement, operation, and execution of section 1335 of the California Unemployment Insurance Code on the ground of the unconstitutionality of said statute under the Constitution of the United States.

III.

Jurisdiction is conferred on this Court by 28 USC 1343 (3) and (4) providing for original jurisdiction of this Court in suits authorized by 42 USC 1983; jurisdiction is further conferred on this Court by 28 USC 2201 and 2202 relating to declaratory judgments, and by 28 USC 2281 and 2284 providing for a three judge court. Jurisdiction is also invoked under the Fourteenth Amendment to the United States Constitution and Title 42 USC 501 et seq.

IV.

Plaintiff Judith Java is a citizen of the United States and a resident of Pittsburg, California. She is the mother and sole custodian of three school age children, all residing with and dependent upon her.

V.

Plaintiff Carroll H. Hudson is a citizen of the United States and a resident of San Pablo, California. She is the mother of one pre-school age child, residing with and dependent upon her.

VI.

Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all persons similarly situated. The class is composed of all present and future unemployed workers who have registered for employment referral with the California Department of Human Resources Development and have been granted unemployment insurance payments therefrom, and who have then suffered a termination of said payments solely because of the requirement imposed by Section 1335 of the California Unemployment Insurance Code. The members of this class are so numerous as to make joinder impracticable; there are questions of law and fact common to the class; the claim of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. Moreover, the parties opposing the class have acted, or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

VII.

Defendant Gilbert Sheffield, is the Director of the California Department of Human Resources Development. Under Section 301 and 304 of the California Unemployment Insurance Code, he is responsible for the management of the California Department of Human Resources Development and the implementation of the laws pertaining to the administration of the California Unemployment Insurance Compensation scheme. Section 1253 of the California Unemployment Insurance Code empowers the Director to determine the eligibility of an unemployed individual to receive payments with respect to any week for which a claim is filed. Section 306 of the California Unemployment Insurance Code further authorizes the director to formulate, adopt, amend or repeal such regulations as are reasonably necessary to enforce the provisions of the Unemployment Insurance Code.

VIII.

On October 31, 1969, defendant California Department of Human Resources Development, hereinafter referred to as "the Department," succeeded to and was vested with the jurisdiction heretofore exercised by the California Department of Employment pursuant to the provisions of California Unemployment Insurance Code Section 301 and California Statutes 1968, chapter 1460 Section 15. Said Department is the instrument for carrying into effect the California Unemployment Insurance system.

IX.

Defendant Esther Perry is the manager of the Pittsburg, California branch office of the Department of Human Resources Development. Defendant Ramon L. Jimenez is the

manager of the Richmond, California branch office of said Department. Said branch offices are responsible for the administration of the California Unemployment Insurance system in Pittsburg and Richmond, California, respectively.

X.

In order to receive federal funds for the Unemployment Insurance Program in the State of California, defendants (and their predecessors in office) have been required by the provisions of 42 USC 501 et seq. to have formulated a "state plan" for unemployment insurance consistent with the provisions of the Constitution of the United States and the provisions of 42 USC 501 et seq.

XI.

42 USC 503 provides in relevant part:

> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for (1) Such methods of administration . . . as are . . . reasonably calculated to insure full payment of unemployment compensation when due; . . . (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; . . .

XII.

On September 4, 1969, plaintiff Judith Java was declared eligible for unemployment insurance benefits by the Pittsburg office of the Department and the payment of such benefits commenced. Her former employer, the Pittsburg *Post Dispatch* filed a notice of appeal of the decision

by the Department in her favor, and on September 10, 1969, she was informed by the Department that payment of her unemployment insurance benefits would be suspended pending the hearing and decision of the appeal. Plaintiff Java has received no unemployment insurance benefits since on or about September 5, 1969, although she has been determined by the Department to be eligible for benefits and has been unemployed continuously throughout this time.

XIII.

In August 1969, plaintiff Carroll H. Hudson was declared eligible for unemployment insurance benefits by the Richmond office of the Department and the payments of such benefits commenced. Her former employer, Payless Drug Stores, Inc. filed a notice of appeal of the decision by the Department in her favor, and on September 8, 1969, she was informed by the Department that payment of her unemployment insurance benefits would be suspended pending the hearing and decision of the appeal. Plaintiff Hudson has received no unemployment insurance benefits since on or about September 8, 1969 although she has been determined by the Department to be eligible for benefits and has been unemployed continuously throughout this time.

XIV.

The suspension of plaintiffs' benefits is due solely to Section 1335 of the California Unemployment Insurance Code which provides in relevant part:

> If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision . . . .

Under Section 1335, an unemployed worker who has been determined to be eligible by the Department for unemployment insurance benefits, and who has begun receiving such benefits, automatically stops receiving such benefits in the event that a former employer files an appeal from the decision by the Department in the employee's favor. Payment of the employee's benefits is stayed while the appeal is decided—a period that often lasts several months.

XV.

Since the suspension of plaintiff Java's unemployment insurance benefits by the Department, she has suffered severe financial injury. Her weekly indemnity from the Department was her sole source of income, except for child support payments made to her by her former husband and the father of her children. Plaintiff Java has three small children to support, of whom she has sole custody under the provisions of a divorce decree. In addition to the normal expenses of a family of four, plaintiff Java must pay for child care while working or seeking work. She has been financially unable to make adequate provision for her family, and is in imminent danger of suffering the repossession of her automobile by a finance company as a result of the suspension of her unemployment insurance payments. She has been compelled to seek public assistance from the Contra Costa County Welfare Department. The amount of financial aid received therefrom does not equal the amount she would otherwise receive from unemployment insurance. As a result, she can not pay for child care and is thereby impeded in her attempts to secure new employment. If her lack of funds results in the repossession of her automobile, she will be further limited in her efforts to seek work. Nonetheless, plaintiff Java has continued to seek employment, to the best of her ability.

XVI.

As a result of the suspension of plaintiff Hudson's unemployment insurance benefits by the Department, she has suffered severe financial hardship. Plaintiff Hudson's husband is undergoing outpatient treatment for mental illness, leaving her as sole support of her infant daughter. She presently is threatened with suit by her creditors, and unless relief is granted, she will be unable to redeem her interest in her automobile which was recently repossessed. She has been financially unable to adequately provide for herself and her child, and has been compelled to seek public assistance from the Contra Costa County Welfare Department since the payments of her benefits were suspended. Since the amount of rent she pays is twice the amount allowed under her welfare budget, she will be compelled to give up her present residence. The amount of her welfare grant is over $100.00 less than the amount of her unemployment benefits per month. As a result, she is unable to pay for child care while seeking employment. Moreover, she is unable to pay for adequate transportation, and has thereby been impeded in her efforts to seek and secure employment. Nonetheless, plaintiff Hudson has continued to seek employment to the best of her ability.

XVII.

By enacting and adopting Section 1335 of the California Unemployment Insurance Code, and by the enforcement thereof, in suspending the payment of unemployment insurance benefits to plaintiffs Java, Hudson, and all other members of their class, defendants, acting under color of State law, have unlawfully deprived plaintiffs Java and Hudson and the other members of their class of unemployment insurance benefits, and their constitutional rights to due process of law and equal protection of the law, and

their rights under 42 USC 501 et seq. in the following manner;

A. Defendants have deprived plaintiffs and their class of due process of law by arbitrarily suspending the payment of unemployment insurance benefits, for which they have previously been ruled entitled by the defendant Department itself, without a prior hearing and a decision adverse to the plaintiffs.

B. Defendants have deprived plaintiffs and their class of due process of law by arbitrarily suspending the payment of unemployment insurance benefits, for which they have previously been ruled entitled by the defendant Department itself, solely because of an appeal by the employer of the Department's initial decision and the mere possibility that the defendant's initial determination might not be upheld.

C. Defendants have deprived plaintiffs and their class of equal protection of the law by irrationally setting up different procedures for employees and employers with regard to appeals of Departmental unemployment insurance eligibility determinations. Employers are afforded a hearing prior to charging their accounts in the event of an employee's appeal of an initial determination that the employee is ineligible for unemployment insurance benefits. But employees are not afforded a hearing prior to the suspension of their benefits when an employer appeals from an initial determination that the employee is entitled to benefits.

D. Defendants, through Section 1335, have deprived plaintiffs and their class of unemployment insurance benefits to which they are entitled under the provisions of 42 USC 503 (a) (1) which "insure full payment of unemployment compensation when due."

E. Defendants, through Section 1335, have deprived plaintiffs and their class of their right under 42 USC 503 (a) (3) to a "fair hearing" before the denial of their unemployment insurance benefits.

XVIII.

Plaintiffs and the class they represent have suffered damage to their well-being and that of their families, and will continue to suffer severe and irreparable injury because of section 1335 of the California Unemployment Insurance Code until said statute is declared illegal and unconstitutional and is enjoined by this Court. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

Wherefore, plaintiffs on behalf of themselves and all others similarly situated respectfully pray that this Court:

1. Convene a three-judge court to determine this controversy pursuant to 28 USC 2281;

2. Enter an order that this action shall be maintained as a class action;

3. Issue a temporary restraining order restraining defendants, their successors in office, agents, and employees from failing to immediately restore to plaintiffs Judith Java and Carroll H. Hudson all unemployment insurance benefits that have been suspended, withheld or terminated pursuant to Section 1335 of the California Unemployment Insurance Code;

4. Issue a preliminary and permanent injunction:

(a) Enjoining defendants, their successors in office, agents and employees: From enforcing that part of Section 1335 of the California Unemployment Insurance Code which provides: "(I)f an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision;" and from suspending

or terminating unemployment insurance benefits to plaintiffs and the class they represent on the ground that an eligibility determination has been appealed by an employer;

(b) Ordering the defendants, their successors in office, agents, and employees to immediately restore to plaintiffs and their class all unemployment insurance benefits that have been suspended, withheld or terminated, pursuant to Section 1335 of the California Unemployment Insurance Code.

5. Enter a declaratory judgment pursuant to 28 USC 2201, declaring the aforementioned provision of Section 1335 of the California Unemployment Insurance Code unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;

6. Enter a declaratory judgment pursuant to 28 USC 2201 declaring the aforementioned provision of Section 1335 of the California Unemployment Insurance Code in violation of Sections 501 (a) (1) and 501 (a) (3) of Title 42 of the United States Code.

7. Allow plaintiffs their costs herein, and grant such other and further relief as may appear to the Court to be equitable, just, and proper.

Dated: November 10, 1969.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: /s/ STEPHEN P. BERZON
Stephen P. Berzon

Dated: November 10, 1969

/s/ JOHN DIAZ COKER
John Diaz Coker

Dated: November 10, 1969

/s/ JAMES M. KLEIN
James M. Klein

VERIFICATION

I, the undersigned, say:

I am the plaintiff in the above-entitled matter; the foregoing document is true of my own knowledge, except as to the matters which are therein stated on my information or belief, and as to those matters I believe it to be true.

Executed on November 5, 1969, at Pittsburg, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ JUDITH JAVA
Judith Java
Plaintiff

VERIFICATION

I, the undersigned, say:

I am the plaintiff in the above entitled matter; the foregoing document is true of my own knowledge, except as to the matters which are therein stated on my information or belief, and as to those matters I believe it to be true.

Executed on November 10, 1969, at San Pablo, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ CARROLL H. HUDSON
Carroll H. Hudson
Plaintiff

Eugene M. Swann
Stephen P. Berzon
John Diaz Coker
James M. Klein
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Filed Nov 10, 1969

United States District Court
Northern District of California

Civil Action No. C-69 350ACW

JUDITH JAVA and CARROLL H. HUDSON, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

AMENDMENT TO COMPLAINT

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, plaintiffs are amending the original pleadings which had been filed with the Court on November 10, 1969. The amendments are as follows:

1. The caption is amended to read:

JUDITH JAVA and CARROLL H. HUDSON, individually, on behalf of themselves, and all others similarly situated,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT; GILBERT SHEFFIELD, individually, and as Director of the California Department of Human Resources Development,

Defendants.

2. At page 3, line 14 of the original complaint the following sentence is inserted: "Defendant Sheffield is sued both individually and in his official capacity".

3. Paragraph IX of the original complaint is deleted.

Dated: November ...., 1969.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: JAMES M. KLEIN /s/
James M. Klein
Attorney for Plaintiffs

Eugene M. Swann
Stephen P. Berzon
John Diaz Coker
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431 Sixth Street
Richmond, California
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United States District Court
Northern District of California

NO. .....

JUDITH JAVA and CARROLL H. HUDSON, et al.,
Plaintiffs,
vs.
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

MOTION FOR A PRELIMINARY INJUNCTION

Upon the verified complaint filed in this case and the affidavits and attached exhibits filed in support of this motion, plaintiffs move this honorable court for a preliminary injunction.

(a) Enjoining defendants, their successors in office, agents, and employees from enforcing that part of Section 1335 of the California Unemployment Insurance Code which provides: "If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision and from suspending or terminating unemployment insurance benefits to plain-

tiffs and the class they represent on the ground that an eligibility determination has been appealed by an employer.

(b) Ordering defendants to immediately restore to plaintiffs and the class they represent all unemployment insurance benefits that have been suspended, withheld, or terminated, pursuant to Section 1335 of the California Employment Insurance Code.

Plaintiffs further pray that this court will allow their costs, and grant such other and further relief as may be equitable, just, and proper.

Respectfully submitted,

CONTRA COSTA LEGAL SERVICES FOUNDATION

Stephen P. Berzon
John Diaz Coker
James M. Klein

By:

Attorneys for Plaintiff

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United States District Court
Northern District of California

No. C-69 350

JUDITH JAVA and CARROLL H. HUDSON, et al.,
Plaintiffs,
vs.
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

This case deals primarily with the procedural rights to be afforded claimants for unemployment compensation benefits, *not* with whether a particular claimant is eligible to receive such benefits. As the Fifth Circuit stated in *Hornsby v. Allen*, 326 F.2d 605, 612 (5th Cir. 1964):

> The proper question to be determined upon the hearing of this case in the district court is not whether plaintiff below is entitled under the law to a liquor license. The determination of whether she should be

granted one is a function of the Aldermanic Board. The role of the courts is to ascertain whether the manner in which this determination was or is made accords with constitutional standards of due process and equal protection.

Defendant California Department of Human Resources Development [hereinafter "Department"] initially determined that plaintiffs were eligible for unemployment compensation benefits. Shortly thereafter, plaintiffs' respective employers filed appeals contesting the initial determination of the Department in the plaintiffs' favor. Pursuant to Section 1335 of the California Unemployment Insurance Code [hereinafter "Code"], and as a direct result of the appeals filed by the employers, plaintiffs' benefits were stayed, pending the outcome of the appeals hearing.

Plaintiffs submit that Section 1335 of the California Unemployment Insurance Code is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; moreover, plaintiffs submit that Section 1335 is in violation of Sections 503 (a)(1) and 503 (a)(3) of the Social Security Act of 1935, as amended, 42 U.S.C. sections 503 (a)(1) and (3). Accordingly, plaintiffs seek to enjoin the enforcement of Section 1335 against them and the class that they represent.

II. SECTION 1335 OF THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE IS IN DIRECT CONTRAVENTION OF THE CONTROLLING FEDERAL STATUTES

A. *Section 503(a)(1) of the Social Security Act of 1935*

State unemployment insurance[1] is authorized and controlled by the federal Unemployment Compensation Acts [hereinafter "Act"] which are included in the Social Security Act of 1935. 42 U.S.C. sections 501-503, 1101 *et seq.* *See also* Federal Unemployment Tax Act, 26 U.S.C. sections 3301-3309. Section 503(a)(1) of the Act provides in part:

> (a) The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment statutes] to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

---

1. In order to be eligible for state unemployment compensation a claimant is required to have worked a specified amount of time, or to have earned a specified amount of wages prior to becoming unemployed. *See California Unemployment Insurance Code* [hereinafter "Code"] sections 1251-1263. The benefits available to the eligible claimants come from the Unemployment Fund, which consists of funds collected from employers, interest and earnings thereon, property acquired from the use of the funds collected, and all money credited to the state's account in the Unemployment Trust Fund pursuant to Section 903 of the Social Security Act. Code section 1521 (1969 Supp.). The actual contribution owing from each employer depends upon the wages paid out to his employees. *See* Code sections 976 *et seq.* (1969 Supp.). While unemployment funds are collected directly from employers, the burden is borne indirectly by his employees. Employment compensation contributions are, of course, part of an employer's total labor cost and are reflected in the wages he is able to pay his employees. See, Note, 73, *Yale L.J.* 357, 361 (1963).

(1) Such methods of administration . . . as are found by the Secretary of Labor to be *reasonably calculated to insure full payment of unemployment compensation when due.*[2] (Emphasis added)

Plaintiffs contend that the procedures authorized by Section 1335 are not "reasonably calculated to insure full payment of unemployment compensation when due." This becomes more evident when the purposes of the Act, as evidenced by the legislative history, are surveyed.

There are three essential purposes which underlie the federal act: To stabilize consumer demand and business in the crucial incipient stages of an economic depression; to provide compensation for a short period of time while the unemployed worker can seek reemployment; and to prevent the worker from having to resort to public assistance such as welfare. *S.Rep.No.* 628, 74th Cong., 1st Sess. 10-13 (1935) [hereinafter *S.Rep.*]; *H.R.Rep.No.* 615, 74th Cong., 1st Sess. 7-9 (1935) [hereinafter *H.Rep.*]

Congress recognized the value of unemployment compensation to the public. It was viewed as a "measure intending to maintain purchasing power, upon which business and

2. The Social Security Act and the Federal Unemployment Tax Act sets forth certain tax and fiscal benefits which flow from state participation in the federal program. These benefits are conditioned upon conformity by state laws and administration with certain federal standards which are embodied in 42 U.S.C. sections 501-503, 1101 *et seq.* and in the Tax Act. To the extent these standards embody the fundamental community values underlying the federal compensation program, states whose laws contravene those values face the loss of the substantial benefits of participation. *See* Note 73 *Yale L.J.* 357, 358 (1963). In the fiscal year ending June, 1963, California's participation in the program entitled the state to $47,000,000 in grants from the federal government for reimbursement of the state's administrative costs, and entitled the state's employers to $320,544,000 credit against the federal tax on employers. *Id.* at n.8.

industry are dependent." *H. Rep.* at 8. Unemployed workers who receive no compensation are to a great extent inhibited from spending money on consumer goods. The effect of this decline in consumption is a decrease in production by business firms, and this, in turn, leads to further unemployment and a depression of the economy. The prompt receipt of unemployment compensation during the critical initial stages of unemployment, however, increases the worker's spending power and in effect stabilizes the overall economic situation. Any significant delay in paying unemployment compensation, on the other hand, contributes to an economic decline.

Congress recognized that unemployment compensation benefits must promptly be made "due" in the initial stages of unemployment, and required in Section 503(a)(1) of the Act that state procedures "be reasonably calculated to insure full payment of unemployment compensation when due." The California procedures for disbursement are not in conformity with this requirement. Section 1335 assures that unemployment insurance benefits are not promptly paid in this state. In the event of an employer's appeal of a Departmental eligibility ruling in an employee's favor, the payment of all unemployment benefits is suspended for many weeks and, in some cases, months. Employers have virtually nothing to lose in filing such appeals and do so as a matter of course. In light of the desire of Congress, therefore, to stabilize consumer demand in the incipient stages of an economic decline, Section 1335 clearly is not "reasonably calculated to insure full payment of unemployment compensation *when due.*" (Emphasis supplied).

The Congress also intended unemployment insurance to accumulate "reserves in times of employment from which partial compensation may be paid to workers who became

unemployed and unable to find other work." *H.R.Rep. No.* 615, 74th Cong. 1st Sess. p. 7 (1935) [hereinafter *H.Rep.*]. Unemployment insurance is not intended to provide an unlimited amount of compensation to all who are unemployed. "Any attempt to make it do so confuses unemployment compensation with relief, which it is designed to replace in large part. It can give compensation only for a *limited period* and for a percentage of the wage loss." *Id.* Emphasis supplied *See also S.Rep. No.* 628, 74th Cong., 1st Sess. 10-13 (1935) [hereinafter *S.Rep.*]. The reason for making the compensation available for a limited period of time rests on the assumption that the worker will seek and find new employment during the period in which he is receiving benefits, and that once he achieves his goal, unemployment compensation is no longer necessary. The crucial period therefore in which the immediate need for compensation arises, and at which the Act is directed, is the time of unemployment and only that period. This is when unemployment compensation is "due" under Section 503(a)(1) of the Act.

Again, the Congressional intent is frustrated by the application of Section 1335. When an employer appeals, no benefits are paid to an eligible employee during the critical initial period of unemployment—the time between jobs. By the time the employee wins the appeal and receives his benefits, he may well have found new employment. Clearly the Congress did not intend unemployment insurance to be paid at any time other than the "limited period" of initial unemployment.

The 1935 Congress also passed the Act to "enable workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment *without having to resort to relief* . . ."*H.Rep.* at 7 (Emphasis added).

To insure that unemployed workers will not be required to resort to welfare, it is essential that state procedures provide for the payment of unemployment insurance benefits during the initial stages of unemployment. California procedures do not offer such protection. On the contrary, because of Section 1335 both plaintiffs, Java and Hudson, have had their benefits suspended during this critical period, and consequently, each has been forced to turn to welfare for support.

Unemployment insurance was viewed by the Congress as a right not a handout. It was developed because of the community's inability to provide the fiscal organization and resources necessary to meet the exigencies of mass unemployment on a charitable basis. See *Steward Machine Co. v. Davis,* 301 U.S. 548, 586-87; Note, 73 *Yale L.J.* 357, 359 (1963). In addition to the economic need, there was an ethical factor as well — i.e. the fact that the psychological impact of receiving "charity" undermined the self-respect and independence of the unemployed "employables".

The legislative history of the federal provisions clearly reflects the idea that unemployment compensation was *not* considered charity.

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief. 79 *Cong. Rec.* 5468 (1935)
>
> In place of the present humiliating, inadequate, and uncertain method of granting relief to the workers through public and private charity, unemployment

> insurance would provide a much more self-respecting type of protection. Under such a system those who were unemployed through no fault of their own would receive, under certain conditions, benefits which would be theirs *by right* and which would be definite in amount . . . A great saving of self-respect and a more decent provision for the fundamental needs of the unemployed and of their families would inevitably result. *Douglas, Standards of Unemployment Insurance* 20 (1933) (Emphasis supplied).

In order to protect the "right" to unemployment insurance Section 503(a)(1) requires state procedures "to be reasonably calculated to insure full payment of unemployment compensation when due." California's procedures are not in conformity with this standard. Plaintiffs were ruled eligible for compensation by the defendants months ago. This was the time in which Congress intended benefits to be "due". Because of Section 1335, however, no benefits have been received by the plaintiffs for over two months. They have been compelled to resort to the welfare system and have been rendered unable to support their families in an adequate fashion.

These months in which plaintiffs have not been paid unemployment compensation are the period with which the 1935 Congress was concerned in enacting the unemployment compensation system: The weeks in which an unemployed worker is without employment and is desperately in need of compensation in order to seek another job; the period in which a worker is striving to avoid having to seek relief from the welfare system; the time that is critical to the stability of the economy in the event of widespread unemployment. Section 1335 of the California Code, therefore, is not in conformity with Section 503(a)(1) of the 1935 Social Security Act and must be overturned.

B. *Section 503(a) (3) of the Social Security Act of 1935.*

The *right* to unemployment insurance was also protected by Section 503(a) (3) of the 1935 Act which provides in part:

> (a) The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment statutes] to any State unless he finds that the law of such State . . . includes provision for—
>
> (3) Opportunity for a fair hearing, before an impartial tribunal for all individuals whose claims for unemployment compensation are denied.

Section 1335 of the Code is not in compliance with this provision. It requires an automatic stay of benefits for which an unemployed worker has previously been found eligible by the Defendant Department, merely because an appeal has been filed by his employer. No reasons are given to the worker for this termination of funds. No opportunity is provided to contest the denial of funds before it occurs. Under Section 1335, unemployment insurance benefits are *denied* to an eligible employee during the critical stages of unemployment.

Section 503(a) (3) was designed to prevent arbitrary State administrative interference with the payment of unemployment benefits during the critical stages of unemployment. In order for Section 503(a) (3) to achieve its purpose, the Congress intended that a fair hearing be held and reasons articulated *before* eligible claimants could be denied unemployment benefits during these important months. Section 503(a) (3) hearings must, of course, take place at a meaningful stage in the unemployment compensation process. And in order to be meaningful, a hearing "decision must be rendered *before* aid can be withheld." *McCulloch v. Terzian* 275 Cal.App.2d 745, 754 (1969).

(Emphasis supplied) *Accord, Kelly v. Wyman,* 294 F.Supp. 893. (S.D.N.Y., Three Judge Court, 1968); *Moore v. Houston,* ..... N.W. 2nd ..... (Mich.Cir.Ct., No. 104435, 1968); *Cf. Wheeler v. Montgomery,* 296 F.Supp. 138 (N.D. Cal., Three Judge Court, 1968).

Section 1335, however, completely bypasses Section 503(a) (3) and provides for an automatic denial of benefits for a prolonged period without a hearing. Precisely the kind of arbitrary action that Section 503(a) (3) was intended to guard against often occurs, since benefits are denied during this period no matter how frivolous the employer's appeal may be. Even when a claimant who has been found eligible is sure to prevail on appeal, he receives no funds until the appeal is decided. By then he may have been driven to welfare, or he may be reemployed, but, in either case, he will not have received his benefits during the period in which he is entitled to receive them. A Section 503 (a) (3) hearing, however, would have revealed the claimant's right to continued compensation and prevented such arbitrary administrative action.

In providing for the automatic withholding of funds from an eligible claimant without a hearing, Section 1335 of the California Code is not in conformity with Section 503(a) (3) of the 1935 Social Security Act and must be overturned.

III. A. DUE PROCESS REQUIRES A HEARING PRIOR TO A SUSPENSION OF UNEMPLOYMENT BENEFITS FOR WHICH AN UNEMPLOYED WORKER HAS PREVIOUSLY BEEN DETERMINED ELIGIBLE BY THE STATE — ESPECIALLY WHEN SUCH A STAY IS OPERATIVE UPON THE MERE ACT OF FILING AN APPEAL BY THE WORKER'S FORMER EMPLOYER.

We begin with the proposition that no one may be deprived of property by state action unless first given notice

and an opportunity to be heard. As recently as 1962, the Supreme Court noted that the right to be heard in civil litigation is "one of the most fundamental requisites of due process." *Schroeder v. New York,* 371 U.S. 208, 212 (1962). The Court has held that in "administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a fair and open hearing, . . ." *Morgan v. United States,* 304 U.S. 1, 15 (1937). Such a hearing was described by the Court as an "inexorable safeguard." *Id.* "Cases requiring that administrative hearings be held before agency action directly affecting *personal well-being* becomes final are increasingly common." *Kelly v. Wyman,* 294 F.Supp. 887, 891 (S.D.N.Y. 1968) (Emphasis added). See also, *Gonzales v. Freeman,* 334 F.2d 570 (D.C.Cir. 1964); *Hornsby v. Allen,* 326 F.2d 605 (5th Cir. 1964). *Homer v. Richmond,* 292 F.2d 719 (D.C. Cir. 1961). See also *Southern Railway Co. v. Virginia,* 290 U.S. 190 (1933); *Londoner v. City and County of Denver,* 210 U.S. 373 (1908).

Due process as it pertains to the right to a hearing has been held to apply to public officials in charge of employment, *Greene v. McElroy,* 360 U.S. 474 (1959), licensing, *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963), public schooling, *Dixon v. Alabama State Board of Education,* 294 F.2d 150 *cert.denied,* 368 U.S. 930 (1961); *Stricklin v. Regents of University of Wisconsin,* 297 F.Supp. 416 (W.D.Wis., 1969), and public housing, *Ruffin v. Housing Authority of New Orleans,* 301 F.Supp. 259 (E.D.La., 1969).

The latest Supreme Court case involving the Constitutional right to be heard prior to being deprived of property is *Sniadach v. Family Finance Corp. of Bay View,* 395

U.S. 337 (1969). In *Sniadach* the Court struck down a Wisconsin procedure whereby a creditor was able to attach his debtor's wages before judgment and before a hearing on the merits. The Court stated that a debtor's wages may eventually be "unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have. . . ." *Id* at 339. The Court in *Sniadach* determined that when "the sole opportunity to be heard comes after the taking," there has been a violation of due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

A most recent case expounding the principle that one cannot be deprived of his property without a prior opportunity to be heard was *Kelly v. Wyman,* 294 F.Supp. 893 (S.D.N.Y. three judge court, 1969). In *Kelly,* several recipients of Aid for Dependent Children benefits under the Social Security Act, 42 U.S.C. sections 601 *et seq.,* were being deprived of such benefits without a hearing before the proper local agency. New York procedures provided for a fair hearing only at a date subsequent to the termination of benefits. The court held that "due process" requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." 294 F.Supp. at 901. Results similar to the *Kelly* case were reached in *McCulloch v. Terzian,* 275 Cal.App.2nd 745, 754 (1969), in which the court held that a hearing "decision must be rendered *before* aid can be withheld" (Emphasis added), and in *Moore v. Houston,* ..... N.W. 2d ..... (Mich. Cir.Ct., No. 104435, 1968). *Cf. Wheeler v. Montgomery* 296 F.Supp. 138 (N.D.Cal., three judge court, 1968), a case decided prior to the decision in the *McCulloch* case, in which

the court rejected the argument that a full fledged hearing was required before the termination of welfare benefits, but held that "at least some hearing prior to the determination of O.A.S. [Old Age Security Benefits] was constitutionally compelled." 296 F.Supp. at 139.

The court in *Kelly* recognized that plaintiffs and their families had suffered greatly as a result of the termination of their benefits. The court stated that to cut off benefits "in the face of this 'brutal need' [of benefits] without a prior hearing . . . is unconscionable unless overwhelming considerations justify it." 294 F.Supp. at 900. Similar hardships face the plaintiffs in the instant case. Moreover, the "overwhelming consideration" that the state proffered in *Kelly* consisted of an interest in protecting the public tax revenues. This interest was not deemed to outweigh the recipient's interest in a "continuation of benefits while a claim of eligibility is disputed." *Id.*

Like plaintiffs in *Kelly* and *Sniadach,* the plaintiffs, Java and Hudson, have suffered severe financial injury as a result of the termination of their benefits. Moreover, in the case at bar, unlike the *Kelly, McCulloch, Moore,* and *Wheeler* cases, plaintiffs have already been determined eligible for benefits as a matter of right by the State itself.

Like Mrs. Sniadach, and the plaintiffs in *Kelly, McCulloch,* and *Moore,* therefore, plaintiffs have a constitutional right to a hearing under the Due Process Clause before their unemployment insurance benefits may be cut off. Section 1335 of the California Code does not afford them this right and is hence unconstitutional.

Pursuant to Section 1335, plaintiffs' benefits were cut off without a hearing solely because their employers filed appeals of State eligibility determinations in plaintiffs' favor and, under Section 1335, their benefits may not be

restored until the appeals have been heard and *second* decisions in their favor have been rendered—a period that may last for several months. Meanwhile, plaintiffs and their class have been deprived of all unemployment insurance benefits during the very weeks in which they are most needed, and moreover, they have no recourse other than to await a decision on the employer's appeal.

Under Section 1335, the question of whether their benefits should be suspended is in no way dependent upon the nature of the employer's case or on the merits thereof. Any act of filing will result in a stay regardless of how frivolous it may be. Plaintiffs contend that the procedure authorized by Section 1335 is totally arbitrary in nature and offends all principles of fair play and justice. " 'Men must turn square corners when they deal with the government.'[3] But the government in dealing with its citizens owes them an equal obligation to right its angles." *Robertson v. United States,* 404 F.2d 1141, 1145 (5th Circuit, 1968). Section 1335 violates the Due Process Clause of the Fourteenth Amendment and consequently is unconstitutional.

B. THERE EXIST NO OVERWHELMING CONSIDERATIONS TO JUSTIFY THE PRESENT PROCEDURE THAT RESULTS IN AN AUTOMATIC SUSPENSION OF BENEFITS WITHOUT A PRIOR HEARING

The court in *Kelly v. Wyman,* 294 F.Supp. 893, 900 (S.D. N.Y. three judge court, 1968), held that "to cut off a welfare recipient . . . without a prior hearing of some sort is unconscionable unless overwhelming considerations justify

3. "Holmes J., *Rock Island, Arkansas and Louisiana Railroad v. United States,* 254 U.S. 141, 143 (1920).

it. Traditionally, such considerations have been urgent in nature and involve the health, safety and well-being of many individuals." In determining when a due process hearing may be delayed, the courts have resorted to a balancing of public and private interests. See *Gonzalez v. Freeman*, 334 F.2d 570 (D.C.Cir.1964); *R.A. Holman & Co. v. S.E.C.*, 299 F.2d 127 (D.C.Cir. 1962); *Dixon v. Alabama State Board of Education*, 294 F.2d 150, *cert. denied* 368 U.S. 930 (1961); *Kelly v. Wyman, supra.* When applied to the problem of unemployment compensation benefits, this test demonstrates the clear superiority of the unemployed worker's interest to those of the defendant. This is true both in the context of prior decisions such as *Kelly, McCulloch,* and *Moore, supra,* and of the purposes of Congress in enacting the Unemployment Compensation Statutes.

The sole interest of the defendant in delaying a hearing until after benefits have been discontinued is a financial one: to protect the public treasury. This interest is of a different order from those which have been held to justify subordination of the private interest. The cases upholding summary administrative action have involved the prevention of some direct harm to the health, safety or well-being of other individuals. *See e.g. Yakus v. United States,* 321 U.S. 414 (1944); *North Amer. Cold Storage Company v. City of Chicago,* 211 U.S. 306 (1908). Thus in an early case the Supreme Court upheld, without a hearing, the summary seizure of allegedly decayed food products. *North American Cold Storage Co. supra.* In a more recent case, the Court has allowed the Food and Drug Administration to seize allegedly mislabeled commodities before a hearing. *Ewing v. Mytinger & Casselberry Inc.*, 339 U.S. 594 (1950). In 1962, the District of Columbia Circuit recognized the public interest in protecting private individuals from fraud

in the securities markets and approved a narrowly drawn summary order issued by the SEC. See *R. A. Holman, supra.*

The public interest in postponing fair hearings protects only the government purse. There is no harm to other specific individuals if payments to a claimant who has been determined eligible is continued until his employer's appeal has been heard and decided. If his employer should win the appeal, the employer's unemployment compensation reserve account is immediately credited with all monies that have been paid to his employee pending the appeal. It is the State's responsibility — not the employer's — to recoup all funds that have been paid previous to the appeal. Moreover, the money dispensed is clearly not lost forever from the public till. The State of California has a statutory right to proceed against an individual to recover compensation to which he is not entitled. Hence, if it is later determined that the claimant is ineligible, the state can both discontinue his benefits and recover the benefits made since the date of ineligibility. California Unemployment Insurance Code, Sections 1375-80 (1969 Supp.). If this procedure should prove unsuccessful, the state has other powers to aid it in obtaining recoupment. For example, it can offset the amount of any overpayment against any future unemployment benefits or state disability insurance for which the claimant becomes eligible. *Cal. Unemployment Insurance Code Section 1379.*

The defendants in the pre-termination hearing cases in the welfare area, *Kelly, McCulloch,* and *Moore,* contended that recoupment of funds was impossible since most welfare recipients are judgment proof. Nevertheless, the courts in all three cases held that the possible loss of these funds was outweighed by the plaintiffs need for these benefits during the period prior to the hearings. Pre-termina-

tion hearings, therefore, were held to be constitutionally required before recipients' assistance could be cut off.

In the field of unemployment insurance, the state's chances of recoupment of benefits (if the employer should prove successful on his appeal) are much better than in the welfare area. Under the California Code, to receive an initial determination of eligibility from the Department, a claimant must be "employable". Upon reemployment, the claimant will, of course, have assets that will be subject to the State's statutory powers of recoupment, *supra*. Plaintiffs Java and Hudson, for example, were both determined "employable" by the State itself when they were ruled eligible for unemployment benefits. Their affidavits show that Plaintiff Hudson had been continuously employed as a cashier for four years prior to her discharge; and that Plaintiff Java had been continuously employed as a newspaper reporter for two years prior to her discharge.

Even if we were to accept the assumption that situations might arise where recoupment by the State would not be possible, there is still no justification for Section 1335 which prohibits the payment of benefits pending employer appeals. Since employer appeals are filed as a matter of course, Section 1335 insures that unemployment insurance is rarely paid in California during the critical initial period of unemployment, despite the purpose and policy of the national unemployment program which dictates that benefits are due and must be paid immediately, once claimants are determined eligible. *See* pp. *2-7 supra*. Furthermore, as in the case of welfare, there is a compelling individual interest on the part of thousands of citizens in a prior hearing before unemployment benefits may be discontinued.

There are no "overwhelming considerations" that justify a suspension of unemployment benefits without a prior

hearing. Section 1335, therefore, is unconstitutional under the Due Process clause of the Fourteenth Amendment.

IV. SECTION 1335 IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Under California procedure, both employers and employees are entitled to appeal the Departmental eligibility determinations if they are not satisfied with the findings therein. California Unemployment Insurance Code sections 1030-1328.

An employee's appeal, however, has an entirely different effect on the State's initial eligibility decision than does an appeal by an employer. When the Department determines the claimant is ineligible for benefits and the claimant appeals, the Department's ruling is given immediate effect. No benefits are paid to the claimant, and the employer's account is not charged, until after a hearing has been held and a decision has been rendered. California Unemp. Ins. Code, §§ 1032, 1335. In contrast, when the department determines that the claimant is eligible for benefits and commences payment, and the employer appeals, the department's ruling is not given effect. The claimant is deprived of the payments without a hearing and adverse decision, on the mere possibility that a future decision may be adverse.

In determining whether a classification results in the kind of invidious treatment proscribed by the Equal Protection Clause, the courts normally will not disturb the legislature's judgment unless the classification, in light of the intended effect, is palpably arbitrary. *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *International Harvester Co. of America v. Missouri,* 234 U.S. 199, 215 (1914); *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 70 (1913). When chal-

lenged on equal protection grounds, the "courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964). Although there is a clear presumption of constitutionality in economic regulation cases, *Golsaert v. Cleary,* 335 U.S. 464 (1948), the presumption may be overcome, if it is determined that the classification bears no substantial, rational relation to a legitimate object of regulation, and is patently arbitrary. *Morey v. Doud,* 354 U.S. 457 (1957); *Truax v. Corrigan,* 257 U.S. 312 (1921).

The procedure dictated by section 1335 is clearly arbitrary in its application. The essence of the unemployment insurance scheme is to ameliorate the economic instability caused by a loss of employment, to keep unemployed workers off relief and to promote the reemployment of the worker. Section 1335 frustrates these purposes by permitting employers to cause loss of benefits to employees when they are most in need, regardless of the merit of the employer's case. Section 1335 thus impedes the reemployment of the individual by depriving him of necessary funds with which to seek employment. As the affidavit of Ralph Warner points out, benefits are often delayed under Section 1335 for several months.

There is no rational basis for suspending initial state eligibility determinations on employer appeals, and not suspending such determinations on appeals by employees. The need to assure recoupment of benefits by the Department if the employer should win his appeal is not a sufficient basis for Section 1335. Section 1335 is not necessary to protect the interests of employers because an employer's account cannot be charged in the event of an erroneous overpayment by the State. California Unemployment Insurance Code Section 1335. Nor is it necessary to protect the public

purse, for, if an employer should win his appeal, the Department can recoup an overpayment out of any future claim for either unemployment insurance or state disability insurance. California Unemployment Insurance Code Section 1379.

Moreover, Section 1335 is applied indiscriminately to all employees whose employers have appealed initial eligibility determinations in their employees' favor, even though employer appeals rarely are successful. *See* affidavit of Ralph Warner. No attempt is made to distinguish between appeals that might be meritorious and those that clearly will be unsuccessful. Thus, there is no justification for treating employers' appeals of unemployment insurance eligibility determinations differently than appeals by employees. The procedures authorized by Section 1335 of the California Code work great hardship on claimants for unemployment insurance and deny them equal protection of the law.

V. CONCLUSION

For the reasons stated above, Section 1335 of the California Unemployment Insurance Code should be declared in violation of the Social Security Act and unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and its enforcement should be enjoined.

Respectfully submitted,

CONTRA COSTA LEGAL SERVICES FOUNDATION

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In the United States District Court for the Northern District of California

Filed Dec. 5, 1969

No. C-69 350 ACW

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually and as Director of the California Department of Human Resources Development,
Defendants.

ANSWER TO COMPLAINT

Defendants answer the complaint and allege as follows:

I

Defendants admit the allegations contained in Paragraphs I, VIII, IX and XI of the complaint.

II

Defendants deny the allegations contained in Paragraphs II-VII, XIV-XVIII.

III

Answering Paragraph X, defendants admit the allegations contained therein and further allege that defendant Director Gilbert L. Sheffield and each of his predecessor directors in office have formulated a state plan for unemployment insurance and filed with the Secretary of Labor such state plan for unemployment insurance consistent with the provisions of 42 USC 501, et seq.; that such state plan and the provisions of the Unemployment Insurance Code and the former Unemployment Insurance Act have been certified by the Secretary of Labor to conform with the provisions of 42 USC 501, et seq., including the provisions of section 1335 of the Unemployment Insurance Code and its predecessor section; and that federal funds for the unemployment insurance program in the State of California have been received by the Department of Human Resources Development and its predecessor the Department of Employment, were so received during all periods involved in the proceeding before the Court, and are being so received predicated upon the approval and certification of the California state plan for unemployment insurance by the Secretary of Labor.

IV

Answering Paragraph XII, defendants admit the allegations contained therein except that defendants deny that the former employer of plaintiff Java filed a notice of appeal "of the decision" by the Department in her favor and defendants allege that the former employer of plaintiff Java filed a notice of appeal "from the determination" by the Department in her favor.

Defendants further allege that at a hearing held on November 12, 1969, before Referee Walter M. Oros of the

Oakland office of the California Unemployment Insurance Appeals Board, plaintiff Java requested a continuance of the hearing and that the referee granted plaintiff Java's request for a continuance to December 1, 1969, and that said hearing was in fact concluded on December 1, 1969. Defendants further allege that on December 3, 1969, Referee Oros rendered his decision reversing the initial determination, ruling that Miss Java was disqualified from receiving benefits.

V

Answering Paragraph XIII, defendants admit the allegations contained therein except that defendants deny that plaintiff Hudson's former employer filed a notice of appeal "of the decision" by the Department in her favor and defendants allege that plaintiff Hudson's former employer filed a notice of appeal "from the determination" by the Department in her favor.

Defendants further allege that on November 12, 1969, Referee Henry Heide issued his decision in case number OAK-12591 affirming the determination of the Department that plaintiff Carroll H. Hudson is entitled to benefits but that the referee declared that the Department should investigate whether plaintiff Hudson refused a job offer in September 1969.

Wherefore, defendants pray that the complaint be dismissed, that plaintiffs take nothing by their complaint, and that the Court grant such other relief as is proper in the premises.

Dated: December 5, 1969

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Plaintiffs,

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California Department of Human Resources Development; Gilbert Sheffield, individually and as Director of the California Department of Human Resources Development,
Defendants.

MOTION TO DISMISS COMPLAINT

Defendants move the Court to dismiss the action on the grounds:

1. That the action is moot;

2. That the Secretary of Labor and the employers who contribute to the Reserve Fund for payment of unemployment insurance are indispensable parties to this action; and,

3. That plaintiffs have failed to state a claim against defendants upon which relief can be granted.

Dated: December 5, 1969

THOMAS C. LYNCH, Attorney General
ASHER RUBIN
Deputy Attorney General
Attorneys for Defendants

POINTS AND AUTHORITIES

In support of this motion defendants incorporate by reference as if fully set forth herein the Memorandum of Points and Authorities submitted by defendants in support of their answer to the complaint, which is also filed herewith.

Dated: December 5, 1969

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vs.

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Defendants.

POINTS AND AUTHORITIES IN SUPPORT OF ANSWER AND MOTION TO DISMISS COMPLAINT

I
INTRODUCTION

The answer to the question raised in this action can seriously and prejudicially affect the unemployment insurance program of the State of California and similar programs in 46 other states (Exhibit 1). In 1968, there were 960,180 claims for unemployment insurance benefits in the

State of California. (Exhibit 2.) A substantial alteration in processing claims of such magnitude would have a serious financial impact on the State of California and impose on it a crushing administrative burden. But defendants do not for defense merely rely on the staggering financial cost and impossible administrative problems posed by the program advocated by plaintiffs. Defendants maintain that the law under attack, a law which has been continuously on the books in California since 1937,[1] is in conformity with the relevant federal statutes and is constitutional within the meaning of the due process clause and the equal protection clause of the Fourteenth Amendment.

II

THE COMPLAINT AS TO PLAINTIFFS JAVA AND HUDSON IS MOOT AND SHOULD BE DISMISSED.

The Court may not decide this case unless a justiciable controversy exists.

> "A justiciable controversy is distinguished from a hypothetical or abstract character; from one that is academic or moot. *United States v. Alaska S. S. Co.*, 253 U.S. 113, at 116 . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." [Citations omitted.] *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240.

See *Portland Web Pressmen's Union Local No. 17 v. Oregonian Publishing Co.*, 9th cir., 286 Fed.2d 4, cert. den., 366 U.S. 912; see also 3 Barron and Holtzoff, Fed. Prac. & Proc. §§ 1263, 1431; *cf. Clark v. Flory*, 237 Fed.2d 597.

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1. Section 1335 was enacted in 1953 as part of the Unemployment Insurance Code, Ch. 308, Stats. 1953. It was based on Ch. 742, § 8, Stats. 1937; Ch. 1085, § 4, Stats. 1939; Ch. 1369, § 2, Stats. 1945; Ch. 1436, §§ 1, 3, Stats. 1947.

No such controversy exists here.

Plaintiff Carroll H. Hudson appeared together with her last employer at a hearing in Oakland, California, on November 7, 1969. On November 12, 1969, Senior Referee Henry Heide rendered and mailed a four-page decision, affirming the Department's initial determination that Miss Hudson was entitled to receive unemployment benefits. Defendants are informed that benefits to plaintiff Hudson are now being paid in accordance with section 1335(b) of the Unemployment Insurance Code. Thus, Miss Hudson's claim is moot and she should be dismissed as a party plaintiff.

With respect to plaintiff Java, defendants are informed that the referee has now rendered his decision reversing the initial determination in favor of Java, and holding that she is entitled to no benefits. In effect, this wipes out the first ruling and renders moot Miss Java's prayer for benefits pending appeal from a favorable determination. The decision of the referee means that she was entitled to benefits at no time and hence the provisions of section 1335 that no benefits are to be paid pending an appeal to a referee is not strictly relevant. This is not to say that Miss Java does not have the possibility of ultimately being entitled to retroactive payments for the subject period. Should she prevail in an appeal to the Appeals Board, her right to such benefits would be established and she would be paid. No recourse to the courts would be necessary. It would be improper, however, and a gift of public funds for the state at this point to pay her any benefits now that an adverse decision of the referee has been made.

Plaintiffs' action was directed at the stay provisions of section 1335. Now that the referee has made his decision

there is no such stay in effect. Hence, plaintiff Java's suit is moot and, since the class is thus deprived of representation by any named plaintiffs, the action as to the class must also be dismissed. Rule 23, F.R.C.P.

III

THE ACTION SHOULD BE DISMISSED FOR FAILURE TO JOIN INDISPENSABLE PARTIES

A. *The Secretary of Labor Should be Joined.*

Defendants maintain that the Secretary of Labor of the United States and the employers of the State of California who contribute to the Unemployment Insurance Fund are indispensable parties to this action. With respect to both, the standard for determining their indispensability is as follows:

> "Whether the United States is an indispensable party to an action is determined by applying the same rules and principles which apply to individuals and private corporations. In other words, the United States is an indispensable party to an action if it has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other party to the suit without radically and injuriously affecting the interest of the United States or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." 2 Kooman, Federal Civil Practice, 431. See also Rule 19, F.R.C.P.

The interests of the United States are inextricably tied into the present cause. In effect, plaintiffs are charging that the Secretary of Labor has acted improperly in approving the California plan and that he has thus violated the duty imposed on him by 42 U.S.C. § 503. That section provides that the Secretary of Labor shall make no certifica-

tion for payment to a state unless the state provides "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; . . .". 42 U.S.C. § 503(a)(3). Should this Court rule that California's current procedures in this respect are inadequate, in order to grant complete relief the Court would be compelled to instruct the Secretary to withdraw his certification until the California plan has been altered to comply with the Court's directive.

The interest of the Secretary of Labor is further confirmed by the fact that this Court's ruling would affect the Secretary's certification of the plans of 46 other states. The Secretary, of course, should act in a consistent manner and subject each state to identical standards. If the standard in California is altered by this Court's decision, the Secretary, in the interest of evenhanded administration, would be required to re-examine his position with respect to the plans of those 46 other states which contain a statutory section similar to section 1335 of the California Unemployment Insurance Code.

Rule 19(a) provides for joinder of a party whose absence would "... leave any of the persons already parties subject to a substantial risk of incurring doubt, multiple, or otherwise inconsistent obligations by reason of his claimed interest." It is conceivable that the Secretary of Labor could take the view that no decision of this Court is binding on him since he is not a party to the litigation. This could place the defendant State of California in the intolerable position of either obeying the order of the Court or adopting the contrary position of a Secretary of Labor. Such a dilemma would be avoided if the Secretary were joined as a party.

See generally *Skokomish Indian Tribe v. France*, 269 Fed.2d 555; see also Order Granting Defendants' Motion to

Dismiss in *Romero v. Wirtz,* now pending before this Court, Action No. 50213. For figures on the participation of the United States in the unemployment insurance program of the State of California, see plaintiffs' brief, page 3, footnote 2.

B. *The Employers of the State of California Should be Joined.*

As with the federal government, the employers of this state will be vitally affected by the outcome of this case. The following analysis demonstrates that it is only a matter of time and arithmetic before the employers' tax rate and liability rise in response to a court decision which, to be implemented, will require more revenue than is currently available.

Rule 19, F.R.C.P., requires joinder if a person claims an interest and is so situated that the disposition of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest. For reasons discussed below, California employers have a substantial interest in the disposition of this action and unless they are joined their ability to protect that interest will be impaired or impeded.

A decision in favor of plaintiffs in this action could substantially increase the amount of taxes paid by California employers to the Unemployment Fund. This increase could result in three different ways:

1. Under section 930 of the Unemployment Insurance Code the wage base on which employers pay taxes for a given year could be $4,100 per employee per year, rather than $3,800. Every employer would in that event pay taxes on the first $4,100 wages paid to each employee, rather than the first $3,800 wages paid to each employee.

2. Under section 976.5 of the Unemployment Insurance Code, the balancing account tax rate paid by employers for

a given year could be at least 0.2% higher than it would be if plaintiffs do not prevail.

3. Under sections 977 and 978 of the Unemployment Insurance Code, the high tax rate schedule under section 978 could apply for a given year, resulting in tax rates for employers as much as 0.8% higher than those under the lower tax rate schedule under section 977 which would apply if plaintiffs do not prevail.

If plaintiffs prevail in this action, an annual unrecoverable loss to the Unemployment Fund would result in the amount of at least $800,000 (Exhibit 2). The loss is cumulative. For example, at the end of five years the total loss would be at least $4,000,000. This annual charge and reduction in what would otherwise be the balance in the Unemployment Fund could cause, in some future years, an increase in employers' tax liability to the Unemployment Fund of as much as $154,000,000 (Exhibit 3).

Under section 930 of the Unemployment Insurance Code, employers pay taxes on the first $3,800 of wages paid each employee during a year whenever the revenues to the Unemployment Fund are equal to or exceed fund disbursements for the preceding fiscal year. Whenever fund disbursements exceed revenues for the preceding fiscal year, employers pay taxes on the first $4,100 of wages paid each employee during the ensuing calendar year. The addition of at least $800,000 annual fund disbursements if plaintiffs prevail herein could, in some year or years, obviously result in imposing the $4,100 wage base rather than the $3,800 wage base. In such case the increased employer liability would approximate $28,000,000 a year (Exhibit 3).

Under section 976.5 of the Unemployment Insurance Code, employers pay at a flat balancing account tax rate

ranging in 0.2% intervals from 0.2% to 1.0%, depending upon the percentage of charges to credits in the balancing account. The addition of at least $800,000 annual charges to the balancing account if plaintiffs prevail herein, could, in some year or years, result in imposing a tax rate under section 976.5 increased by 0.2% from what would otherwise be the rate. The increased employer liability for a year would approximate $38,000,000 (Exhibit 3).

Under sections 977 and 978 of the Unemployment Insurance Code, whenever the Unemployment Fund year-end balance equals or exceeds 5% of wages paid in employment during the preceding fiscal year, employers pay taxes under a low rate schedule ranging from 0.0% to 2.7%, depending on their employer reserve account ratio. Whenever the fund balance is less than 5% under the formula, employers pay much higher taxes under the high schedule ranging from a minimum of 0.8% to 2.7%, depending on their employer reserve account ratio. An employer whose tax rate was 0.0% on the low rate schedule would pay at the 0.8% rate on the high rate schedule. The tax rates of most other employers would also be increased on the high rate schedule. The cumulative reduction in the Unemployment Fund balance which would result if plaintiffs prevail herein, could, in some year or years, obviously result in imposing the high tax rate rather than the low tax rate. The total increased employer liability for a year on the high rate schedule would approximate $88,000,000 (Exhibit 3).

Were this Court to issue a decision in favor of the plaintiffs in the absence of employer representation as a party herein, the substantial employer interest in the disposition of this action would be impaired and impeded. No apparent future remedy would exist. This Court, in an

analogous situation, recently issued its order for dismissal for failure to join employers, with leave to amend. *Romero v. Wirtz,* Civil No. 50213. We submit that the joinder of employer representation as indispensable parties is required under Rule 19 and in the absence of such joinder the Court should dismiss the action.

IV

SECTION 1335 OF THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE IS IN CONFORMITY WITH THE FEDERAL STATUTES.

A. *The California Plan Provides For Payments "When Due".*

Plaintiffs point out that section 503(a)(1) of the Social Security Act provides that the Secretary of Labor shall not certify a plan unless the state procedure is "reasonably calculated to insure full payment of unemployment compensation when due". Plaintiffs then discuss the legislative history and conclude that "the crucial period therefore in which the immediate need for compensation arises, and at which the Act is directed, is the time of unemployment and only that period. This is when compensation is 'due' under section 503(a)(1) of the Act." Plaintiffs' brief, p. 5, 13-16.

At the outset it should be established that unemployment insurance benefits are to be paid irrespective of need. "Unemployment compensation is greatly preferable to relief *because it is given without any means test.*" (Emphasis added.) House Report No. 615, 74th Congress, 1st Session (1935). "Unemployment compensation differs from relief in that payments are made as a *matter of right, not on a needs basis,* but only while the worker is involuntarily unemployed." (Emphasis added.) Senate Report No. 628, 74th Congress, 1st Session (1935).

Although at one point plaintiffs appear to recognize that need is irrelevant in determining whether they may receive unemployment benefits (plaintiffs' brief, p. 6, 13-27), plaintiffs nevertheless argue their obvious need as the basis for immediate receipt of unemployment benefits. Indeed, plaintiffs contend they should be paid unemployment benefits because they need them, and that they should be paid unemployment benefits immediately because their need is desperate. Neither contention can be sustained, since need is irrelevant to eligibility for unemployment benefits. Unemployment benefits are payable to involuntarily unemployed persons who meet statutory conditions, regardless of whether the person claiming benefits is rich or poor. Benefits cannot be denied because a person is rich and doesn't need them; they cannot be granted because a person is poor and needs them.

The emphasis on involuntary unemployment, and not need, as the determinant of eligibility for unemployment insurance is further supported by California's Unemployment Insurance Code provisions. The amount of weekly benefits a worker receives varies proportionately with his wages in a four-quarter period and the quarter in which he receives his highest wages. Cal. Unemp. Ins. Code §§ 1275, 1280, and 1281. The higher his wages, the higher the weekly benefit and the total maximum benefits he receives. Thus, those who may have more need receive lower, not higher, benefits. Moreover, a worker who has less than $720 in the four quarters of his base period is not entitled to any benefits. Cal. Unemp. Ins. Code §§ 1275 and 1281. Consequently, the worker who may be *most* in need of unemployment insurance has no entitlement to benefits.

Thus, a claimant's need can have no effect on determining when payments are "due". The right to benefits is not accelerated in direct relation to the severity of a claimant's economic situation.

In the context of the Social Security Act the legislative history is unenlightening concerning the definition of the word "due". Generally, the primary meaning of that word is "owing". *People v. Buckles,* 57 Cal.App.2d 76, 79. The word connotes a matured and fixed obligation. *Cf., Joyce v. Scott,* 265 Fed.2d 369, 371-372. See also *In re Ingersoll Co.,* 148 Fed.2d 282, 284. In the instant case, it cannot be said that benefits are "owing" or that the obligation is fixed and immutable following an initial determination. In effect, the most that plaintiffs could establish is that after the initial determination favorable to them they have what might be termed an inchoate right. The right will become vested, so to speak, if the employer does not file an appeal or, in the event of such an appeal, the referee affirms the initial determination.

This timing represents a considered effort by the Legislature to minimize the possibility of inprovident payment. The initial procedure for determining whether a claimant is eligible for benefits does not amount to a full scale investigation nor does it remotely resemble a hearing at which the employer may fully air his views. At this preliminary stage no testimony is taken under oath, there is no right to confrontation, right to call witnesses, etc. For this reason the Legislature has decreed that the administrative determination of the Department that a claimant is entitled to benefits is not sufficient, standing alone, to justify immediate payment of those benefits. For that matter, a decision of a referee reversing an initial denial of benefits is treated in similar fashion, i.e., standing alone, a referee's decision awarding benefits following an initial denial is not deemed sufficient to justify an immediate payment of benefits. However, in the judgment of the Legislature, the risk of unwarranted and improper benefit payments is so re-

duced by the agreement of the Department and the referee that a claimant is eligible, that upon such concurrence benefits may reasonably be considered "due". Hence, at that point the Department commences payment immediately, despite the possibility that a later decision may eventually result in a ruling that the claimant is in fact ineligible.

The wisdom of the Legislature's decision in this regard is graphically illustrated by recent statistics. In 1968 there were 5,526 referees' decisions where claimants were initially determined to be eligible and following such determination, the employer appealed. The employers prevailed in 2,602 cases. In other words, employers were successful in 47% of the decisions issued. Had the Department been required to pay benefits to claimants during the pendency of any employer appeal, unjustified payments would have been made in 47% of the cases and would have resulted in approximate overpayment of $800,000. (Exhibit 2.) And, contrary to plaintiffs' argument concerning recoupment, the state would not have collected these overpayments for under section 1375 of the Code such overpayments would have been waived because they would have been "received without fault on the part of the recipient, and . . . recovery would be against equity and good conscience." Hence the $800,000 overpayment would have been unrecoverable.

Parenthetically, we might note that the determination concerning when payments from the state are "due" is one properly to be made by the Secretary of Labor and plaintiffs' argument in this regard should be directed at him. The Secretary of Labor has certified the California plan and, to defendants' knowledge, the plans of 46 other states which have provisions similar to the section being examined

here. Implicit in his certification is a finding by him that benefits are in fact paid by the state "when due". The Secretary is presumed to have acted correctly. Plaintiffs' facile arguments that payments are not being made "when due" are supported neither by the administrative findings of the Secretary nor by the commonly accepted legal meaning of the subject term.

B. *The California Plan Provides For a Hearing Which is Timely and Fair.*

On pages 7-9 of their brief plaintiffs contend that the California plan does not conform with the requirements of section 503(a)(3) of the Social Security Act, which provides that the Secretary shall make no certification unless he finds that the state provides for "(3) Opportunity for a fair hearing, before an impartial tribunal for all individuals whose claims for unemployment compensation are denied.". The argument is that staying benefits pending an appeal violates this provision. The argument has no merit.

First, the claims for benefits in the instant case have both been *granted,* not denied. Note that the language of the federal statute refers to "claims" which have been denied. It does not refer to a policy of withholding benefits after a claim has been granted. It would make absolutely no sense to believe that Congress intended that a state must provide a full scale hearing upon an applicant's first application for benefits. It is inconceivable that Congress would have intended that for the year 1968, for example, the State of California should have provided a full scale hearing in the 960,180 unemployment insurance claims which were filed in this state. This conclusion is buttressed by the fact that of the 368,022 claims which were denied, 226,066 were denied because the claimant was found to be disqualified or ineligible for benefits on some statutory basis, e.g., he was discharged because of misconduct.

The impracticability of affording a claimant a trial type hearing each time his claim comes up for review is also demonstrated by the fact that a claimant must meet several statutory conditions to continue to be eligible for benefits. These conditions must be met *each week.* Chief among the conditions to be met are that the claimant has registered for work, was able to and was available for work, and has sought suitable work in accordance with specific instructions of a public employment office. The claimant may be disqualified for a number of reasons. Among these are that the claimant left his most recent work voluntarily without good cause or was discharged for misconduct connected with his most recent work, that he made a false statement or representation or concealed material facts, that he, without good cause, refused to accept suitable employment when proffered, or that he left his work because of a trade dispute. The disqualification may be imposed after a claimant has been paid one or more weeks of benefits.

When a claim is filed, the Department mails notices to the claimant's last employer and each base period employer (Sections 1327 and 1329, Unemployment Insurance Code). Employers may protest eligibility by submitting facts to the Department. The Department conducts a fact-finding informal investigation and after considering all available facts determines whether the claimant is eligible and not subject to disqualification. No informal conference confrontation or trial type hearing is held; none is required. There is no testimony under oath, nor are witnesses called; there are none of the ordinary trappings associated with the trial type hearing concept. A claimant may be determined eligible and be paid benefits for one week, but in the next week be determined ineligible or disqualified. To require a trial type hearing each time would be absurd.

The sensible interpretation of section 503(a)(3) of the Social Security Act is that the portion which requires an opportunity for a fair hearing for individuals whose claims are "denied" should be construed as meaning "are *finally* denied". This means that a claimant who applies for unemployment insurance benefits will receive initially an administrative determination concerning his eligibility. If his claim is denied, he then has an opportunity to appeal and the denial is not considered final until he has had an opportunity for a fair hearing before a referee. On the other hand, if the claim is initially granted at the administrative level, the employer is given the right to appeal that determination because he is the one whose money pays the claimant's benefits.

IV

DUE PROCESS IS NOT VIOLATED BY A PROCEDURE WHICH PERMITS A SHORT STAY OF BENEFITS WHILE A REFEREE DECIDES AN APPEAL.

Plaintiffs argue that they are entitled to a hearing prior to being deprived of their property. In part, this begs the question. Plaintiffs have no property of which they can be deprived. Only a preliminary determination relating to their eligibility has heretofore been made. Before this determination matures into a binding adjudication requiring the state to pay benefits, fairness demands that the employer be given an opportunity to be heard.[1]

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1. Contrary to Ralph Warner's completely unfounded and self-serving statement that employers file appeals as a matter of course (see p. 2, lines 4-6, of Mr. Warner's Affidavit, attached to plaintiffs' Complaint; see also reference thereto, plaintiffs' brief, p. 4, lines 24-25), the statistics confirm that the nefarious motive attributed to the employer, i.e., filing frivolous appeals in order to hold up employees' benefits, simply does not exist. Indeed, the statistics show that employers are overwhelmingly conscientious in determining whether or not to appeal an initial determination. In 1966

A "suspension" (plaintiffs' brief, p. 9, line 4) cannot take place until an initial award has been made, a circumstance which does not obtain here.

Assuming arguendo, however, that the preliminary determination by a clerk at one of the Department's centers does confer some property rights on a claimant, we submit that nevertheless the procedures subsequent to this initial decision fully satisfy the demands of due process.

"Due process" and "fair hearing" are not magic incantations which can compress reasonable time intervals for administrative determination and obliterate carefully conceived administrative procedures. The requirements of due process necessarily vary with the type of proceeding involved, *Hannah v. Larche,* 363 U.S. 420, 440, and cannot be equated with inflexible procedures universally applicable to every imaginable situation. *Cafeteria Workers' Local 473 v. McElroy,* 367 U.S. 886, 895. In each case the nature of the alleged right, the nature of the proceeding, and the possible burden on that proceeding, are all relevant considerations. *Hannah v. Larche, op. cit.* at 442.

The procedures here are tailored to administrative necessity, but never at the expense of a claimant's rights. The problem is one of balancing, as was stated by Chief Justice

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there were 4,890 referees' decisions on employer appeals in which the employer prevailed in 2,201 cases or 45% of the time. In 1967 there were 5,567 such cases; employers prevailed in 2,432 cases, or 44% of the time. In 1968 there were 5,526 in which employers prevailed in 2,602 cases, or 47% of the time. In that year there were over 400,000 cases of claimants receiving benefits *with no appeals filed at any time.* See Exhibit 3. Indeed it is the employees or claimants who appeal far more often than the employer. In San Francisco, for example, from the period October 3 to November 12, 90 appeals were decided; of these 69 had been filed by claimants and only 21 by employers. In the same jurisdiction there are now some 163 pending appeals of which 125 have been filed by claimants and only 38 by employers. In other words, claimants appeal almost four times as often as employers.

Gibson in the case of *Abelleira v. District Court of Appeal,* 17 C.2d 280, 298:

> "The very essence of the act is its provision for the prompt payment of benefits to those unemployed. (See 88 Univ. Pa. L.Rev. 137, 139.) Any substantial delay would defeat this purpose and would bring back the very evil sought to be avoided. The legislature, recognizing the importance on the one hand of avoiding improvident payments without due consideration of the right thereto, and the danger on the other hand of withholding the payments for long periods through the slow processes of appeal to the commission and perhaps eventually to the courts, took a middle course. It provided for a preliminary appeal or review of the first determination where payments were ordered. This appeal, ordinarily decided in a short period of time, carries with it a stay. But when this second decision has also been made in favor of the applicants, the benefits begin, with protection, as already noted, for the employer in the event of later reversal."

Adopting the position advocated by plaintiffs here would radically alter the balance adverted to in *Abelleira* and would encourage dishonest and devious practices on the part of claimants. A claimant whose claim is initially determined to be valid would have incentive to delay any hearing and decision by a referee. If the claimant received benefits pending the appeal, it would be in his best interests to seek continuances and to plead that key witnesses are unavailable, etc. This would add to the administrative burden and would compound the possible financial loss to the state and conceivably to employers whose rates would be affected.

In support of their argument on due process plaintiffs rely principally on two cases, *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, and *Kelly v. Wyman,* 294

F.Supp. 893.[2] Defendants submit that neither *Sniadach* nor the welfare cases exemplified by *Kelly* are in point.[3]

In the *Sniadach* case the court attacked the garnishment procedure as a particularly pernicious weapon used against the helpless poor. The wage earner whose wages are attached is in a severe economic squeeze: because he is employed he is eligible neither for welfare nor for unemployment insurance benefits. Moreover, his wages may be frozen for an inordinately long period as he awaits a trial and a decision in the civil courts.

The *Sniadach* situation is not present here. While creditors may send notices to the claimant, no weapon such as garnishment is available for use by the creditors or by collection agencies. Expeditious administrative procedures, not available in *Sniadach*, are provided here.[4] Wel-

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2. The decision in *Kelly* is by no means final. In citing this case plaintiffs failed to include in their citation the fact that the United States Supreme Court has noted probable jurisdiction. 394 U.S. 971.

3. Defendants are appalled at plaintiffs' brazen misrepresentation to this Court concerning the holding in *McCullough v. Terzian*, 275 A.C.A. 745. In the latter case an attack was made on the type of hearing afforded a welfare recipient prior to termination of benefits to him. The superior court agreed with the petitioners that the procedure did not satisfy due process requirements and hence, was invalid. *Alameda County Superior Court*, Judgment entered May 2, 1968, No. 379011. The appellate court, however, *reversed* the lower court decision. The appellate court stated at page 753,

> "We conclude that the regulations do comport with the due process clause of the United States Constitution."

Plaintiffs' statement on page 10 of their brief, lines 26-29, that the holding in *McCullough* is similar to the holding in the *Kelly* case is totally false and in fact, directly contrary to what the *McCullough* court decided.

4. In the Oakland office of the Department, where these cases were brought, 66% of all cases appealed during October 1969 were decided within 45 days of the date the appeal was filed. By contrast, a typical waiting period for the hearing of a civil case in the Oakland Superior Court is 18-19 months. (This figure was supplied by the Calendar Clerk of the Alameda County Superior Court.)

fare benefits, apparently unavailable in *Sniadach,* are paid to the claimants here.

In a recent welfare case, *Wheeler v. Montgomery,* now pending before the United States Supreme Court (October Term, Nos. 14 and 62) an attack was made on the procedure of terminating welfare benefits prior to affording a welfare recipient a full scale hearing. The plaintiffs in that case, as here, relied on the *Sniadach* case for their argument that the hearing should precede termination of benefits. In distinguishing *Sniadach* the U. S. Solicitor General wrote as follows,

> "The present case is therefore unlike *Sniadach v. Family Finance Corp.,* 395 U.S. 337, where the Court invalidated, under the Due Process Clause of the Fourteenth Amendment, a State procedure by which wages could be garnished without prior notice to or opportunity for hearing for the wage earner. The key to that decision was that '[w]e deal here with wages—a specialized type of property presenting distinct problems in our economic system' (p. 340). Both the majority opinion and the concurring opinion of Mr. Justice Harlan made plain that the State procedure was invalid because garnishment involves the immediate taking of a wage earner's 'property'; and the Court stated (p. 339) that although '[s]uch summary procedure may well meet the requirements of due process in extraordinary situations,' [fn. omitted] garnishment by a wage earner's creditor was not such a situation. In the present case, however—as in cases involving government employment, licenses, and other benefits commonly dealt with through the administrative process—the recipients have no property (in the classic sense) of which the government is seeking to deprive them. In cases involving the question what procedural due process required in this 'property'-less context, this Court has several times indicated that the answer permissibly varies with the proceeding and private

interests concerned. [fn. omitted] *E.g., Hannah v. Larche,* 363 U.S. 420, 440; *Cafeteria Workers v. McElroy,* 367 U.S. 886, 894-895.

"The present statistics show that substantially more ineligible than eligible individuals request 'fair hearings'. [fn. omitted] Moreover, if plaintiffs prevail, both the number and proportion of ineligible individuals requesting fair hearings might increase. Such a change might reflect either a substantial degree of use of 'fair hearing' requests as a means of prolonging benefit payments for individuals who clearly are no longer eligible, or, as the appellant in No. 62 suggests in his brief, pp. 13-17, the efficient functioning of the relatively new pre-hearing notice-and-conference techniques. In either case, the argument for 'fair hearing' prior to termination or reduction of benefits would be even less strong than it is now." Amicus Brief of the United States, pp. 28-30.

And in this action the *Sniadach* case has even less relevance than it does to the welfare situation. In *Wheeler* the claimant had already been receiving benefits and the question concerned termination. Cutting off benefits to a person who has adjusted to receiving them is a more profound blow than withholding compensation upon an initial application, as is factually the case here.

Plaintiffs also cite *Kelly v. Wyman,* 294 Fed. Supp. 893. In that case the plaintiffs would have been literally destitute without welfare payments. Once such payments were cut off, presumably the recipients would have absolutely no source of income whatever. They suffered from what the court termed a "brutal need". Plaintiffs here have admittedly suffered considerable inconvenience but they are, however, receiving welfare benefits. True these benefits are modest, but plaintiffs are only asked to maintain themselves on such a modest scale for approximately 30 to 45 days,

during which a decision on the appeal is being made. Moreover, the inconvenience suffered by plaintiffs here cannot be equated with the type of desperate need describd in *Kelly*. Indeed the court itself in the *Kelly* case acknowledged that differences in the degree of hardship may affect the question of a timing of the hearing. 294 Fed. Supp. at 901, fn. 20.

One further factor which distinguishes the unemployment insurance situation from the welfare cases is that in the latter a showing of need is a prerequisite to eligibility for welfare payments. As we have pointed out, *supra*, pp. 9-10, no such showing is required in the unemployment insurance area.

It is singularly inappropriate for plaintiffs to invoke *Kelly* since the *Kelly* court noted that its requirement of prior hearing would not necessarily apply to other areas of social security administration. 294 Fed. Supp. at 901, fn. 20.

On pages 12 through 15 of their brief, in addition to discussing the recoupment procedures available to the state, plaintiffs maintain that the procedure here is a summary one and that the factual circumstances of this case do not bring it within those for which summary procedures have traditionally been permitted.

This case does not involve a summary procedure. Plaintiffs have not had any property, goods, license, or the like which can be abruptly seized or terminated by the state. The failure to pay benefits after a preliminary determination is not within the class of cases which have traditionally been described as involving summary procedures.

Once more, however, we may assume arguendo that a summary procedure is in fact involved here. Even so, the procedures here do not offend due process. On page 13

plaintiffs state categorically that summary procedures are permitted only when health, safety or well-being of third persons may be affected. The argument is that in the case here the state is not protecting public health or well-being, only public monies, and that this consideration is insufficient to justify the withholding of benefits.

Plaintiffs are doubly in error. First, the safeguarding of public monies may well justify summary procedures. In the field of taxation, for example, taxes may be collected without prior hearing. Internal Revenue Code, 26 U.S.C., 6861-6864. This has been justified on the basis that "taxes are the lifeblood of government and their prompt and certain availability an imperious need." *Bull v. U.S.*, 295 U.S. 247 at 259 (quoted with approval in *In re Quakertown Shopping Center, Inc.*, 366 Fed.2d 95). The procedure has withstood due process attacks. *Phillips v. Commissioner*, 283 U.S. 589; *U.S. v. Plotkin*, 239 Fed. Supp. 129.

Second, these tax cases demonstrate not only that safeguarding of public funds is a valid consideration, but also that summary procedures are not restricted to cases such as dangerous foods and drugs. Perhaps the closest analogy is the Old Age Survivors Disability Insurance situation where, as the *Kelly* court pointed out, 294 Fed. Supp. 893, 901, fn. 20, benefits may be suspended without prior hearing. 42 U.S.C. 403(h)(3). See also *Flemming v. Nestor*, 363 U.S. 603. *Cf. Escobedo v. State of California*, 35 Cal.2d 870; *Orr v. Superior Court*, 71 A.C. 233, concerning suspension of driver's license without prior hearing.[5]

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5. It is interesting that *Escobedo* and *Orr* were both discussed in *McCullough v. Terzian*, 275 A.C.A. 745, cited by plaintiffs, with the court specifically noting that those two cases did not involve health and safety.

V

A STAY OF BENEFITS PENDING APPEAL DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Plaintiffs' argument that they are being deprived of equal protection is specious and unconvincing. The argument is that when a claimant is initially ruled ineligible the state implements that determination by withholding payment, but that when the claimant is ruled eligible, the state does not implement the determination and hence the claimant is deprived of equal treatment under the law. This analysis is absurd. Would plaintiffs contend that a plaintiff in an ordinary civil suit for damages who prevails at the trial level is entitled to be paid immediately by defendant despite the taking of an appeal? Under our system of law, waiting periods pending the determination of various types of appeal are common and cannot be said to be discriminatory.

The Legislature has created no unreasonable classification here. While any appeal is pending, whether by the employer or by the claimant, no benefits are paid. This rule is applied indiscriminately and does not turn on which party received a favorable preliminary ruling.

Plaintiffs' statement on page 16 of their brief is misleading and inaccurate. At lines 4-7 plaintiffs state,

> "In contrast, when the Department determines that the claimant is eligible for benefits and *commences payment*, and the employer appeals, the Department's ruling is not given effect." (Emphasis added.)

First, the Department should *not* commence payment following the initial determination.[6] Hence plaintiffs' suc-

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6. Apparently plaintiffs did receive one or two payments. This does not appear to be justified under the statute and the Department's practice in this regard is currently under review. Defendants' arguments in this memorandum are predicated on such payments not being made.

ceeding statement concerning deprivation of payment is misplaced. The fact is that no final determination has been made that the claimant is entitled to any benefits at all. The claimants, therefore, cannot be said to be "deprived" of payments until a determination has been made that they are entitled to them.

Second, during the period which concerns us here — the time between initial determination and decision by the referee — the claim is treated the same whether the claimant wins or loses: he does not receive benefits until the referee makes his determination. It is true that after the referee's decision the claimant may be treated differently, but this difference operates to his benefit. If he has initially been ruled ineligible but this decision is reversed by the referee, the claimant does not receive benefits until the employer's appeal to the Appeals Board is decided. If, on the other hand, a claimant was initially ruled eligible and the referee affirms this ruling then the claimant receives benefits immediately, as was the case with the claimant Hudson. Apparently, it was felt by the Legislature that in cases of two affirmances of the claimant's eligibility, his chance of ultimately prevailing was sufficiently great to justify paying him on an interim basis. See *Abelleira v. District Court of Appeal,* 17 C.2d 280, 298-299. This action is reasonable, and, as stated earlier, redounds to the benefit of the employee.

VI
CONCLUSION

Plaintiffs argue that the California plan is not in conformity with the relevant federal statutes. Defendants maintain that no such lack of conformity exists and that in any event, plaintiffs have failed to join the Secretary of Labor, who is an indispensable party to this action. The interests

of employers of the State of California is also manifest and the action cannot proceed unless they too are joined as parties.

Concerning the constitutional arguments, plaintiffs have sought to lump the welfare cases together with unemployment insurance law. The two, however, are not similar since the criterion of need, a critical factor in a welfare situation, is irrelevant to eligibility for unemployment insurance benefits. The short delay incident to an appeal assures fairness to affected employers and is a reasonable procedure adopted by the Legislature.

For the reasons stated defendants respectfully submit that the complaint should be dismissed.

Dated: 12-5-69.

Respectfully submitted,

THOMAS C. LYNCH, Attorney General

/s/ ASHER RUBIN
Asher Rubin
Deputy Attorney General
Attorneys for Defendants

The following are the states whose unemployment insurance laws make provision for suspension of benefits during the pendency of appeal:

1. Alabama—Section 216(D)
2. Alaska—Section 23.20.340(e)-(g)
3. Arizona—Section 23-773(B)
4. Arkansas—Section 81-1107(e)
5. Colorado—Section 82-5-2(2)
6. Connecticut—Section 31-241
7. Delaware—Section 3318(b)
8. District of Columbia—Section 46-311(b)
9. Florida—Section 443.07(5)
10. Georgia—Section 6(b)
11. Hawaii—Section 383-43

12. Idaho—Section 72-1368(j)
13. Illinois—Section 704, 706
14. Indiana—Section 1802
15. Iowa—Section 96.6(2)
16. Kansas—Section 44-709(b)
17. Kentucky—Section 341.420(3)
18. Louisiana—Section 1635
19. Maine—Section 1194(2), (3)
20. Maryland—Section 7(i)
21. Massachusetts—Section 39
22. Michigan—Section 32(c), (d)
23. Minnesota—Section 268.10(2)(1)
24. Mississippi—Section 7381
25. Missouri—Section 288.070(b)
26. Montana—Section 87-107(b)
27. Nebraska—Section 48-644
28. Nevada—Section 612.465
29. New Hampshire—Section 282.5(B)(7)-(10)
30. New Jersey—Section 43.21-6(b)(1)
31. New Mexico—Section 59-9-6(b)
32. New York—Section 598
33. North Carolina—Section 96-15(b)(2)
34. North Dakota—Section 52-06-29
35. Ohio—Section 4141.28(G)(H)
36. Oklahoma—Section 216(e)
37. Oregon—Section 657.265(2), (4)
38. Pennsylvania—Section 501(e)
39. Puerto Rico—Section 5(h)
40. South Carolina—Section 68-155
41. South Dakota—Section 61-7-5, 61-7-11
42. Tennessee—Section 50-1325(B)
43. Texas—Section 6(b)
44. Utah—Section 35-4-6(e)
45. Virginia—Section 60.1-61
46. West Virginia—Section 11
47. Wisconsin—Section 108.09(6)(d)
48. Wyoming—Section 27-27(E)

United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA and CARROLL H. HUDSON, et al.,
Plaintiffs,
vs.
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

AFFIDAVIT

I, George Roche, the undersigned, having been duly sworn, do depose and state that:

1. I am the Chief of the Research and Statistics Section of the Department of Human Resources Development of the State of California; and I have, in my possession and under my control, the statistical records of the said Department of Human Resources Development relating to unemployment insurance claims filed, eligibility and disqualifications considered and the outcome thereof, appeals filed to referees of the California Unemployment Insurance Appeals Board and the outcome of said appeals, and the amount of unemployment insurance benefits paid by said Department from the Unemployment Fund.

2. The statistical records of the Department of Human Resources Development indicate the following claims, referee appeals, and benefit activity for the calendar year 1968:

A. The total number of claims filed was 960,180.

B. 141,956 of these claims were determined invalid because the claimants had insufficient wages in their base periods.

C. 818,224 of these claims were filed by claimants who had sufficient wages in their base periods to file valid claims.

D. There were 667,993 issues of eligibility for or disqualification from unemployment insurance benefits which resulted in written determinations by the Department.

E. Of the 667,993 issues of eligibility, 441,927 were determined by the Department in favor of the claimant while 226,066 resulted in the claimant being disqualified from receiving unemployment insurance benefits for one or more weeks.

F. In 1968, 45,353 appeals were filed to referees of the California Unemployment Insurance Appeals Board.

G. Referees in 1968 issued 26,509 decisions of which 5,526 were decisions on appeals by employers and 20,983 were decisions on appeals by claimants.

H. Of the 5,526 decisions on appeals by employers, the decision reversed the determination of the Department and held in favor of the employer in 2,602 cases or 47 percent of these decisions. The decision affirmed the determination of the Department and held in favor of the claimant in 2,924 cases or 53 percent of these decisions.

I. A total of $404.3 million was paid in unemployment insurance benefits.

3. If benefits had been paid to the claimants involved in the 2,602 cases in which the employer prevailed before the referee in 1968, the cost of such benefits to the Unemployment Fund would have been approximately $800,000 based upon a weekly benefit amount of $50 and an average duration prior to the referee decision of slightly in excess of six weeks.

4. The statistical records of the Department of Human Resources Development concerning the claims and appeals activity set forth in paragraph 2 hereof for the calendar years 1965, 1966, and 1967, and additional appeals activity for the calendar year 1968 is set forth in the table attached hereto.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ GEORGE ROCHE

State of California
County of Sacramento—ss.

George Roche being first duly sworn under oath, represents that he has subscribed to the foregoing affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 18th day of November, 1969.

/s/ SYDNEY R. JOHNSON
Notary Public in and for the State of California

[SEAL]

	1965	1966	1967	1968
No. of Claims Filed	1,116,074	1,011,489	1,029,897	960,180
No. of Claims Filed With Qualifying Wages	922,422	851,986	876,493	818,224
No. of Claims Filed Without Qualifying Wages	193,652	159,503	153,404	141,956
No. of Determinations on Eligibility	719,497	653,209	694,263	667,993
No. Favorable to Claimant	400,477	385,807	412,433	441,927
No. of Disqualifications Assessed	319,020	267,402	281,830	226,066
No. of Appeals Filed	40,165	37,527	43,184	45,353
No. of Appeals Withdrawn or Dismissed	9,342	9,850	11,454	10,632
No. of Decisions Issued	26,355	25,913	28,654	26,509
No. of Decisions on Appeals Filed by Employers	6,726	4,890	5,567	5,526
No. Favorable to Employer	3,400	2,201	2,432	2,602
No. Favorable to Claimant	3,326	2,689	3,135	2,924
No. of Decisions on Appeals Filed by Claimants	19,629	21,023	23,087	20,983
No. Favorable to Claimant	7,268	7,629	8,476	7,079
No. Favorable to Employer	12,361	13,394	14,611	13,904
Total Unemployment Insurance Benefits Paid (In Millions)	$533.7	$412.8	$458.7	$404.3

United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA and CARROLL H. HUDSON, et al.,
Plaintiffs,
vs.
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

AFFIDAVIT

I, J. E. McNeil, the undersigned, having been duly sworn, do depose and state that:

1. I am Chief of the Accounting Section of the Department of Human Resources Development of the State of California, and I have custody of the records relating to employers' unemployment insurance tax accounts.

2. I further certify that the best estimate of the difference in taxes payable by employers, in a year like 1968, based on the high and low wage bases and tax rates is as shown in the table below:

a. Taxes payable on
(1) $4,100 wage base..... $596.7 Million
(2) $3,800 wage base..... $568.7 Million
Difference ..... $ 28.0 Million

b. Balancing account taxes payable
(using $3,800 taxable wage base) at
(1) 1.0% general rate.....$191.0 Million
(2) 0.8% general rate.....$153.0 Million
Difference ..... $ 38.0 Million

c. Taxes payable (using $3,800 taxable wage base) on

(1) High rate schedule....	$377.6 Million	
(2) Low rate schedule....	$289.6 Million	
Difference		$ 88.0 Million
Total Difference		$154.0 Million

I declare under penalty of perjury that the foregoing is true and correct.

/s/ J. E. McNeil
J. E. McNeil

State of California
County of Sacramento—ss.

J. E. McNeil being first duly sworn under oath, represents that he has subscribed to the foregoing Affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 19th day of November, 1969.

/s/ Sydney R. Johnson
Notary Public in and for
the State of California

[Seal]

Eugene M. Swann
Stephen P. Berzon
John Diaz Coker
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United States District Court
Northern District of California

No. C-69 350 ACW

Judith Java, et al.,
Plaintiffs,
vs.
California Department of Human Resources Development, et al.,
Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' BRIEF IN REPLY TO DEFENDANTS' ANSWER

I. *The Case Is Not Moot and Should Be Decided Here and Now*

Defendants contend that plaintiffs Java and Hudsons' suits are "moot" and that therefore, the action must be dismissed for mootness. Even assuming, *arguendo*, that Section 1335 of the Unemployment Code is not operating upon the named plaintiffs at this time, the action is not moot.

In a recent federal case, four Black juveniles brought a class action challenging segregation in the Florida reform schools. While the case was pending in federal district court, the named plaintiffs were released from the reform schools. The Court then dismissed the case on grounds of mootness. The Fifth Circuit reversed in *Singleton vs. Board of Commissioners,* 356 F.2d 771 (5th Cir., 1966) holding that the case was not moot as long as there remained "a subject matter on which the judgment of this Court can operate." So long as the schools were segregated, the court "could render an effective decree, responsive to the complaint." Similarly in *Buckner vs. School Board,* 332 F.2d 452 (4th Cir., 1964) and *McSwain vs. Board of Education,* 138 F. Supp. 570 (E. D. Tenn., 1956), two school desegregation cases in which named plaintiffs no longer were immediately involved in the outcome of the case, the courts held that the cases could not be dismissed on grounds of mootness. Justiceable controversies remained.

Similarly in the case at bar, "a subject matter on which the judgment of this Court can operate" remains—the State's practice under Section 1335 of suspending unemployment insurance benefits for which claimants have previously been found eligible, merely upon an appeal by an employer. This unlawful procedure continues to exist and is affecting scores of unemployment insurance claimants—members of plaintiffs' class—at this time. A "justiceable controversy" continues to exist and the issue of mootness is, in fact, not an issue at all.

If this Court were to hold the controversy moot because the referee has rendered a decision in the named plaintiffs' individual cases, it would be virtually impossible to challenge the constitutionality of the procedures required by Section 1335—ongoing procedures that affect thousands

of claimants each year. Since it is within the defendant's discretion to decide any individual case as promptly as it sees fit, any attack upon the stay provisions required by Section 1335 could be rendered "moot" by a quick determination of the named plaintiffs' claim for unemployment compensation benefits. For example, in the case at bar, plaintiff Hudson had not had a hearing before a referee on her employer's appeal at the time her complaint was filed. However, shortly after the filing of her complaint, a referee's decision was rendered. The fact remains that it might not be possible for a three-judge federal court to decide this important question before a decision in any given named plaintiff's case would be handed down by an appeals' referee.

In a recent case, *Carroll vs. President and Commissioners of Princess Anne County,* 393 U.S. 175 (1968) the Supreme Court reviewed the constitutionality of a 10 day ex parte injunction, restraining petitioners from holding political rallies in defendant county. The county argued that the 10 days had expired and thus the case was moot as to petitioners. The Court held that the case was not moot because it was quite possible that other 10 day injunctions could occur in the future. The Court cited *Southern Pacific Terminal Co. vs. ICC,* 219 U.S. 498 (1911), in which the "Court declined to hold that the case was moot although the two-year cease-and-desist order at issue had expired. It said 'The questions in the orders of the Interstate Commerce Commission are usually continuing . . . and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review. . . .'" 393 U.S. at 178-179.

Similarly in the case before this Court, it is clear that the stay provisions required by Section 1335 are presently

in effect and will be enforced against all future claimants. As in *Carroll, supra,* a determination that the case is moot might enable the important procedures in question to escape judicial review.

Moreover, while the personal interests of the named plaintiffs may have diminished, they have not terminated. Statistics inform us that it is not unlikely that plaintiffs Java and Hudson will again be claimants for unemployment insurance. In that role they may again be affected to their detriment by the automatic suspension of their benefits required by Section 1335. Such possibility of "future use" of unemployment insurance demands that plaintiffs be able to pursue their claim. See *Mitchell vs. United States,* 313 U.S. 80, 93 (1941); *Anderson vs. City of Albany,* 321 F.2d 649 (5th Cir., 1963). As Judge Wisdom pointed out in *Singleton,* 356 F.2d at 774, n. 4:

> "We note, however, that the nature of the public facility involved in this case demands liberal interpretation of future-use requirements. The plaintiffs point out the practical difficulty of ever getting a decision on the merits if present incarceration is a prerequisite, since at none of the Florida (reform) schools is the average sojourn of an inmate as long as the one year (and more) that often elapses between the filing of a complaint and the issuance of an order in the average desegregation suit." (Emphasis added)

As mentioned *supra,* similar practical difficulties would exist in obtaining a hearing on the legality of Section 1335 if this case were to be found moot.

Finally in *Kelly vs. Wyman,* 294 F.Supp. 887, 890 (S.D. N.Y., 1968), Judge Bryan noted:

> "Defendants urge that the case is moot, based on affidavits showing that most of the plaintiffs are now

receiving public assistance on an emergency basis. Judicial determination of questions of this importance cannot thus be evaded and, in any event, dismissal is not appropriate when the individuals purport to represent a class." (Emphasis added)

None of the cases cited by defendant on the issues of mootness involved or even resembled a class suit. In *Aetna Life Insurance Co. vs. Haworth,* 300 U. S. 227, 240 (1937), which involved a claim by the holder of an insurance policy, the Court held that an actual controversy existed between the insurer and the insured, notwithstanding the nonpayment of premiums. *Portland Web Pressmen's Union Local No. 17 vs. Oregonian Publishing Co.,* 286 F.2d 4 (9th Cir., 1960), Cert. denied, 366 U.S. 912, involved an action by a labor union to compel employers to submit a controversy between parties to arbitration. The Court held that the complaint sought a determination which could not alter either party's rights or remedies under their collective bargaining agreement and that, therefore, it failed to raise a justiceable question which could be the basis of declaratory relief. *Id* at 8. The final case cited by defendants in support of their contention of mootness involves an action to enjoin state segregation statutes as it affected a particular South Carolina park. *Clark vs. Flory,* 237 F.2d 597 (4th Cir., 1956). The court held that the controversy was moot because, while the action was pending, the state legislature enacted a statute providing that the park in question be closed to the public.

For the reasons stated above, this action is clearly not moot, and defendants' motion to dismiss on that ground should be denied.

II. *There Are No Indispensable Parties to This Action Other Than Those Already Named*

A. *The Secretary of Labor is not an indispensable party to this action.*

It is not true that a final decree cannot be rendered in this action without "radically and injuriously affecting the interest of the United States" or "without leaving the controversy in such a situation that its final determination may be incompatible with equity and good conscience." (Defendants' Brief, page 4) While it is true that the validity of each States' unemployment compensation scheme is dependent upon certification by the Secretary of Labor, it does not follow that because of this certification requirement, the Secretary is an indispensable party to this action. Plaintiffs are not seeking de-certification of the California Unemployment scheme, but merely an order enjoining one statutory provision in that scheme and requiring the continuation of unemployment benefits to claimants who have previously been determined eligible by the State until such claimants are found ineligible.

Certainly if Section 1335 were found unlawful, the Secretary of Labor would not be compelled to withdraw certification from California's unemployment insurance scheme. The federal statutes and corresponding federal regulations do not require stay provisions such as those found in Section 1335. Further, the unemployment compensation statutes of at least 2 States—Washington and Vermont—contain no provision whereby an eligible claimant's benefits are "stayed" pending the outcome of an appeal by the claimant's previous employer. The Secretary of Labor has certified Vermont's and Washington's statutes, and if California were ordered to eliminate its stay provisions, its certification would likewise remain unaffected.

In *National Welfare Rights Organization vs. Wyman*, 304 F.Supp. 1346, 1349-1350, (E.D.N.Y., 1969), Judge Weinstein reviewed a long list of welfare cases in which State welfare procedures, statutes, and regulations were challenged as contravening controlling federal authority and found that in such cases, neither the federal government nor the state were harmed for failure to include the appropriate federal agency as a party. In Judge Weinstein's words:

> "Nor will HEW be harmed by non-joinder. While it does have an arguable interest in the subject matter of this litigation since it is required to review each state plan to determine whether the plan complies with federal standards and those standards may affect the fiscal contribution of the federal government, HEW's absence will not 'as a practical matter' impair its ability to protect that interest or expose any of the existing parties to double or inconsistent liability." 304 F.Supp. at 1350.

Similarly, the Secretary of Labor is not an indispensable party in the case at bar.

B. *The employers of the State of California are not indispensable parties to this action.*

Without any substantial authority, the State urges dismissal on the ground that California's tens of thousands of employers are indispensable parties to this action. This motion is totally without merit.

The State's position is based on the premise that overpayment will sometimes result if the stay provided for under Section 1335 is eliminated, and that the State's employers will have to bear the responsibility for resources any financial deficit that may result. However, the State does not point out that an employer who is successful on

appeal suffers no harm if benefits have been paid to his former employee pending the appeal. Upon winning his appeal, the employer's unemployment compensation reserve account is immediately credited with all monies that have been paid to his former employee. It is the State's responsibility—*not the employer's*—to recoup all funds that have been paid previous to the appeal.

Nor is it likely that the State will suffer substantial losses due to overpayment if Section 1335 is overturned. As is pointed out in Section IV of this brief, the State has been endowed with ample recoupment powers by the Legislature.

Even assuming, *arguendo,* however, that the State will suffer some losses due to overpayments, it is not at all certain that employers' unemployment tax rates will need to be increased. At the State's current rate of economic growth, present unemployment tax rates should provide sufficient funds to cover any overpayment losses.

Moreover, if more funds are needed, the interests of the State's thousands of employers are not significantly greater than the interests of the State's hundreds of thousands of employees. For while unemployment funds are collected directly from employers, the burden is borne directly by their employees. Such funds are, of course, part of an employer's total labor cost and are reflected in his employees' wages. *See* Note, 73 YALE L. J. 357, 361 (1963). Likewise, the State's millions of consumers also have an interest in labor costs since such costs are directly reflected in consumer prices. Employers, employees, and consumers alike, therefore, all are affected by the possibility of increased taxes, costs, and prices, yet none have an interest so great or so certain as to be indispensable parties to this action. "One is not 'an indispensable party' merely because he has some interest in the subject matter of the litigation

. . . ." *Lubin vs. Chicago Title and Trust Co.*, 260 F.2d 411, 413 (7th Cir., 1958).

The possibility of future tax increases is not a sufficient basis for intervention of right. *Blocker vs. Board of Education*, 229 F.Supp. 714, 715 (E.D.N.Y., 1964). Nor is it a sufficient basis for indispensability. The defendant's motion to dismiss for failure to join the State's tens of thousands of employers as indispensable parties should be denied.

III. *The California Plan Fails to Provide Unemployment Compensation "When Due" In Contravention of Section 503(a)(1) Of The 1935 Social Security Act.*

Defendants state that plaintiffs are arguing "their obvious need as the basis for immediate receipt of unemployment benefits" (Defendant's Brief, p. 9, 26-28). This is not so. Certainly, plaintiffs agree that the legislative history clearly demonstrates that unemployment compensation benefits were intended to be paid as a matter of right and not as a matter of need. A corollary of that proposition is, of course, that need is irrelevant in the determination of an individual's claimant's application for benefits. Plaintiffs never have contended otherwise.

However, as plaintiffs' main brief points out (brief in support of Motion for Preliminary Injunction, pp. 2-7), the legislative history also reveals that Congress was very concerned with "need" when it passed the unemployment compensation statutes. It determined that individual and societal need was most critical during the crucial initial stages of unemployment, and consequently required that the right to unemployment insurance benefits vests at this stage. *S. Rep. No. 628*, 7th Cong., 1st Sess. 10-13 (1935); *H. R. Rep. No. 615*, 74th Cong., 1st Sess. 7-9 (1935).

Defendant has stated that the median length of time between the date of filing of an appeal and the date of

mailing an appeals decision in 1968 was 49 days. (Answer to Plaintiffs' Interrogatories, No. 15, p. 5). Plaintiffs' latest information reveals that in Alameda County, appeals filed on December 10, 1969, were not being heard by a referee until mid-February, 1970. The written decision takes two to three weeks longer. But even if we assume the 49 day figure is presently valid, literally thousands of claimants who have been determined eligible by the State for unemployment insurance receive no benefits during at least the first seven weeks of unemployment, if their previous employer decides to appeal.

Defendants indicate that this delay is not very serious because claimants are able to resort to welfare during this period. (Defendant's Brief, pp. 18, 20). This may be the position of the State of California but it runs directly counter to the position of the 1935 Congress when it enacted the federal unemployment statutes. Unemployment compensation was passed to "enable workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment *without having to resort to relief . . . .*" *H. R. Rep. No. 615,* 74th Cong., 1st Sess. p. 7 (1935). (Emphasis added) *See also S. Rep. No. 628,* 74th Cong., 1st Session 10-13 (1935). A scheme that drives eligible claimants to seek rather than avoid welfare does not provide unemployment compensation "when due" and violates Section 503(a)(1) of the Social Security Act of 1935.

Moreover, this time it is especially important that the will of the 1935 Congress in enacting Section 503(a)(1) be enforced. The legislative history makes it clear that a principal purpose of unemployment compensation was to stabilize consumer demand and business in the crucial incipient stages of an economic recession or depression. *S.*

Rep. at 10-13; *H. Rep.* at 7-9. It was intended "to maintain purchasing power, upon which business and industry are dependent." *H. Rep.* at 8. To accomplish this purpose, benefits must of course be made "due" at the initial stages of unemployment.

The unemployment rate is presently at its highest rate in recent years and is still increasing. As the unemployment rate increases, the *greater* the appeals back log will thicken. Thus the likelihood of delay under Section 1335 is strengthened. Such delay directly frustrates the primary purposes of unemployment compensation as expressed by the 1935 Congress. Section 1335 of the California Unemployment Code, which provides for delays in payment to eligible claimants, is therefore not in conformity with Section 503(a)(1) of the Social Security Act of 1935 and must be overturned.

IV. *The Automatic Stay of Benefits Pending an Appeal Violates Due Process*

Defendants assert that no "property right" accrues to a claimant as a result of an initial determination by the Department that he is eligible. A "preliminary determination relating to (his) eligibility" without an opportunity for his employer to be heard (Defendant's Brief, pp. 14-19). This is also not so. The claimant's previous employer is personally contacted by the claims interviewer prior to a determination on nearly every claim. This procedure includes communication with the employer on several occasions in complex cases. The employer is given the opportunity to rebut all facts stipulated by the claimant. Only after the substance of a claim is thoroughly investigated is a determination made.

Clearly unemployment benefits are a property right within the meaning of the Due Process Clause. The State

itself concedes that unemployment compensation is "a matter of right". (Defendant's Brief, p. 9). And once claimants are determined eligible for unemployment benefits, they can not be suspended merely upon the filing of an appeal by an employer without trampling on claimants rights to due process of law. See *Kelly vs. Wyman*, 294 F.Supp. 893 (S.D.N.Y., three judge court, 1968)[1] *Accord, Camerena vs. Department of Public Welfare*, 449 P.2d 957 (C.A., Ariz., 1969). *See also Sniadach vs. Family Finance Corp.*, 395 U.S. 337 (1969).

Defendants seek to distinguish *Kelly vs. Wyman, supra*, on the ground that the "brutal need" in *Kelly* is absent from the unemployment compensation situation inasmuch as unsuccessful claimants can, as a matter of course, fall back on welfare assistance.[3] But this is simply not so. Welfare is usually not available for interim relief. As in *Kelly*, "brutal need" is often present.

Welfare is not available to single employable males between ages 20 and 45 in most counties. Moreover, in order to qualify for welfare assistance, a claimant with a family must come within the requirements of one of the categorical aid programs, of which there are four: Old Age Assistance; Aid to the Disabled; Aid to the Blind; and Aid to Families with Dependent Children. *Cal. W & I Code* Section 11200; 11200; 12500; 13500. Since a claimant would have to be of retirement age, disabled, or blind to qualify for the first three, they can be disregarded. In order to qualify for the fourth, the claimant's family must have less than $600 in

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1. *Kelly* was argued before the Supreme Court on October 13, 1969 and is presently awaiting decision. The case's present title is *Goldberg vs. Kelly*.

3. As discussed in Section III of this brief, defendants ignore the fact that the express purpose of the federal unemployment statutes was to obviate the need for welfare assistance.

personal property. *Cal. W & I Code* Section 11255. The claimant with a family therefore, must divest himself of nearly all of his assets before he can be eligible for the receipt of welfare benefits.

Defendants also cite the case of *Abelleira vs. District Court of Appeals,* 17 C.2d 280 (1941) as justification for the stay provisions of Section 1335. (Defendant's Brief, pp. 16 & 17). The basic premise of the *Abelleira* court was that the first appeal was "ordinarily decided in a short period of time." 17 C.2d at 290. *Abelleira* was decided in 1941. At the time of the decision there were far fewer appeals filed by employers. For example, in 1953,[2] twelve years after *Abelleira,* 1,943 employers filed appeals to initial determinations in favor of claimants. In 1964 there were 7,328 such appeals—representing over a 350% increase in appeals by employers. In 1969 the number of employer appeals numbered 5,526. (see statistics attached to answers to interrogatories). These statistics indicate a sizable increase in the case load of the Department in the 29 years since *Abelleira* with a consequent increase in paperwork and in procedural delays. In 1968 the median length of time between the date of filing and the date of mailing of an appeals decision was 49 days.

Chief Justice Gibson wrote in *Abelleira:*

> "The very essence of the act is its provision for the prompt payment of benefits to those unemployed . . . Any substantial delay would defeat this purpose and would bring back the very evil sought to be avoided . . ." 17 C.2d at 298

Plaintiffs submit that the present period of delay in the payment of benefits upon an employer's appeal neither

2. The statistics of the Human Resources Development Department go back only as far as 1953.

existed nor was contemplated in 1941 when *Abelleira* was decided. We are no longer dealing with "a short period of time," but a significant number of weeks and even months in an unemployed person's life. If the court in *Abelleira* had been confronted with a lengthy period of delay, it is not unreasonable to assert that it would not have condoned the stay provisions of Section 1335.

Finally, defendants contend that "overwhelming considerations" justify Section 1335—the need to prevent loss from overpayments. Defendants cite Section 1375 of the Unemployment Code and urge that the statute precludes the recovery of overpayment inasmuch as they would be "waived because they would have been received without fault on the part of the recipient, and . . . recovery would be against equity and good conscience." (Defendant's Brief, p. 12).

However, in raising Section 1375, the State makes no reference to its decisions interpretating this statute. Under these cases, the Department is not precluded by Section 1375 from recovering the great bulk of its projected overpayments. The most recent expression of the California Unemployment Insurance Appeals Board on the interpretation and effect of Section 1375 makes it clear that the amount of *fault* on the part of the claimant that must be established in order to recover an overpayment is *no more than an innocent misinterpretation of law.* California Unemployment Insurance Appeals Board, *In the Matter of Eveard A. Goding* (July 15, 1969) Precedent Benefit Decision No. P-B-47. In *Goding,* the claimant was dismissed by his employer and became eligible for unemployment insurance. He appealed the discharge to his labor union and was subsequently reinstated to his job by the labor arbitrator, and awarded back wages *less what he had al-*

ready received in unemployment compensation. The Department claimed that the benefits it paid out to the claimant constituted an overpayment. Although the Board of Appeals expressly found that "the claimant in this matter was free from misrepresentation, wilful nondisclosure or fraud," he was still held liable for repayment of the amount overpaid. (*Id.* at 7.) His only fault consisted of his and *his union's* error in interpretating the meaning of Section 1265 of the Code, which regulates the receipt of supplemental unemployment compensation in cases in which the employer has a supplemental private insurance plan. As to the limitation on the collection of overpayments where "equity and good conscience" would be offended, the Appeals Board in *Goding* refused to waive the overpayment despite the fact that the claimant's award for back wages was specifically reduced by the amount of unemployment benefits. Section 1375 did not deter recovery despite the hardship involved and the claimant's lack of fraudulent intent.[4]

Furthermore, a decision by an appeals referee in favor of an employer usually involves an automatic finding of fault on the part of an employee. The great bulk of appeals by employers of decisions in favor of their former employees arise from Section 1253, 1256, and 1257 of the Unemployment Code. These require that the claimant be able and available for work if offered, that he not have resigned from his last employment without good cause, that he not have been fired for misconduct, and that he made no misrepresentations to secure benefits. A finding adverse to the claimant on any of these issues presupposes fault on the part of the claimant who obtains benefits by

4. For similar results, see California Unemployment Insurance Appeals Board Benefit Decision No. 5960, and Miscellaneous Decision No. 431.

violating the provisions thereof. Hence, in most cases, Section 1375 does not apply and the claimant automatically becomes liable for the overpayment.[5]

No "overwhelming considerations," therefore justify the suspension of unemployment benefits from eligible claimants without a prior hearing. Section 1335 is unconstitutional under the Due Process clause and must be enjoined.

V. *Conclusion*

For the reasons stated above, and in plaintiffs' Brief in Support of a Preliminary Injunction, defendant's motions to dismiss should be denied and plaintiffs' motion for a preliminary injunction should be granted. Section 1335 of the California Unemployment Insurance Code violates the Social Security Act of 1935 and the Due Process Clause of the Fourteenth Amendment, and its enforcement should be enjoined.

Respectfully submitted,

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: JAMES M. KLEIN /s/
James M. Klein

5. As discussed on p. 14 of Plaintiffs' main brief, the State has ample recoupment powers including criminal sanctions under Section 2101 and 2113 of the Unemployment Code.

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Contra Costa Legal Services Foundation
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In the United States District Court
Northern District of California

No. C-69 350 ACW

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually and as Director of the California Department of Human Resources Development,
Defendants.

INTERROGATORIES BY PLAINTIFFS

The plaintiffs pursuant to Rule 33, Federal Rules of Civil Procedure (28 U. S. C. A.) require the defendants, CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT and its Director, GILBERT SHEFFIELD, to fully answer the following interrogatories:

1. Subsequent to January 1, 1969, how many claimants have applied for unemployment compensation benefits?

2. Subsequent to January 1, 1969, how many claimants for unemployment compensation benefits have been found eligible for such benefits?

3. Subsequent to January 1, 1969, how many claimants for unemployment compensation benefits whose employers have filed formal protests have subsequently been determined eligible for such benefits?

4. Subsequent to January 1, 1969, how many employers have filed appeals to eligibility determinations that were made in favor of claimants?

5. Subsequent to January 1, 1969, what has been the median length of time (week days and weekend days included), for all appeals referred to in interrogatory 4, between the day that an appeal has been filed by an employer and the day that the final decision by the appeals referee on the appeal has been rendered and recorded?

6. Subsequent to January 1, 1969, what has been the median length of time (week days and weekend days included), for all appeals referred to in interrogatory 4, between the day that an appeal has been filed by an employer and the day that a fair hearing has been held on the appeal?

7. Subsequent to January 1, 1969, what has been the median length of time (week days and weekend days included), for all appeals referred to in interrogatory 4, between the day that the fair hearing referred to in interrogatory 6 has been held and the day that the final decision by the appeals referee on the appeal has been rendered and recorded?

8. Subsequent to January 1, 1969, how many of the appeals by employers referred to in interrogatory 4 have been successful on the merits? (i.e. how many eligibility determinations in favor of employees have been reversed on appeals by employers?)

9. Subsequent to January 1, 1969, how many employees filed appeals of eligibility determinations that they were not eligible for unemployment benefits?

10. Subsequent to January 1, 1969, how many of the appeals by employees referred to in interrogatory 9 have been successful? (i.e. how many eligibility determinations that employees were not eligible for benefits have been reversed on appeal?)

11. Between January 1, 1968 and December 31, 1968, how many claimants applied for unemployment compensation benefits?

12. Between January 1, 1968 and December 31, 1968, how many claimants for unemployment compensation benefits were found eligible for such benefits?

13. Between January 1, 1968 and December 31, 1968, how many claimants for unemployment compensation benefits whose employers had filed formal protests were subsequently determined eligible for such benefits?

14. Between January 1, 1968 and December 31, 1968, how many employers filed appeals to eligibility determinations that were in favor of claimants?

15. Between January 1, 1968 and December 31, 1968, what was the median length of time (week days and weekend days included) for all appeals referred to in interrogatory 14, between the day that an appeal was filed by an employer and the day that the final decision by the appeals referees on the appeal was rendered and recorded?

16. Between January 1, 1968 and December 31, 1968, what was the median length of time (week days and weekend days included), for all appeals referred to in interrogatory 14, between the day that an appeal was filed by an employer and the day that a fair hearing was held on the appeal?

17. Between January 1, 1968 and December 31, 1968, what was the median length of time (week days and week-end days included) for all appeals referred to in interrogatory 14, between the day that the fair hearing referred to in interrogatory 16 was held and the day that the final decision by the appeals referee on the appeal was rendered and recorded?

18. Between January 1, 1968 and December 31, 1968, how many of the appeals by employers referred to in interrogatory 14 were successful? (i.e. how many eligibility determinations in favor of employees were reversed on appeals by employers?)

19. Between January 1, 1968 and December 31, 1968, how many employees filed appeals of eligibility determinations that they were not eligible for unemployment benefits?

20. Between January 1, 1968, and December 31, 1968, how many of the appeals by employees referred to in interrogatory 19 were successful? (i.e. how many eligibility determinations that employees were not eligible for benefits were reversed on appeal?)

21. Has the Department compiled any reports regarding any of the aforementioned matters in 1967, 1968 or 1969? (i.e. number of claims for unemployment benefits, number of claimants initially found eligible, number of protests filed by employers to these claims, number of appeals filed by employers of eligiblity determinations in their employees' favor, number of days between the filing of such appeals and the rendering of final decisions by appeals referees on the appeals, number of employer appeals that result in affirmances and number of employer appeals that result in reversals, number of appeals filed by employees of eligi-

bility determinations that they are ineligible for benefits, number of employee appeals that result in affirmances and number of employee appeals that result in reversals?)

22. If the answer to interrogatory 21 is yes, list the full title of each such report compiled in 1967, 1968, and in 1969.

Dated: November 24, 1969.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: STEPHEN P. BERZON /s/
Stephen P. Berzon
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Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually and as Director of the California Department of Human Resources Development,
Defendants.

SUPPLEMENTAL INTERROGATORIES BY PLAINTIFFS

The plaintiffs pursuant to Rule 33, Federal Rules of Civil Procedure (28 U. S. C. A.) require the defendants, CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT and its Director, GILBERT SHEFFIELD, to fully answer the following interrogatories:

1. For the week February 8, through 14 inclusive, only, how many appeals were filed by employers from benefit determinations in favor of the claimant, whenever made, in the referee offices of Oakland, San Francisco, Los Angeles, and San Diego?

2. During what week, or weeks, is each of the appeals referred to in interrogatory No. 1 scheduled to be heard by a referee?

3. For the week February 15 through 21 inclusive, only, how many appeals were filed by employers from benefit determinations in favor of the claimant, whenever made, in the referee offices of Oakland, San Francisco, Los Angeles, and San Diego?

4. During what week, or weeks, is each of the appeals referred to in interrogatory No. 3 scheduled to be heard by a referee?

5. For all appeals referred to in interrogatories Nos. 1 and 3, what is the median, and arithmetic mean, number of days (week-end days included) between the date said appeals are filed, and the date now scheduled to be heard before a referee, not counting the day filed, and counting the day heard?

6. For all appeals filed by employers from benefit determinations in favor of the claimant during the year 1941, what is the median, and arithmetic mean, number of days (weekend days included) between the dates said appeals were filed, and the dates actually heard by a referee, not counting the date filed, and counting the date heard?

7. For all appeals filed by employers from benefit determinations in favor of the claimant during the year 1953, what is the median, and arithmetic mean, number of days (weekend days included) between the dates said appeals were filed, and the dates actually heard by a referee, not counting the date filed, and counting the date heard?

8. For all appeals filed by employers from benefit determinations in favor of the claimant during the year 1954, what is the median, and arithmetic mean, number of days (weekend days included) between the dates said appeals were filed, and the dates actually heard by a referee, not counting the date filed, and counting the date heard?

9. For the calendar year 1968, what was the median, and the arithmetic mean, number of weeks of benefits received by all claimants for unemployment insurance, per claimant?

10. For the calendar year 1968, what was the median, and the arithmetic mean, number of weeks of benefits received by only those claimants who prevailed in appeals by employers from initial determinations in favor of the claimant, per claimant?

11. For calendar 1969, what was the median, and arithmetic mean, number of weeks of benefits received by all claimants for unemployment insurance, per claimant?

12. For calendar 1969, what was the median, and arithmetic mean, number of weeks of benefits received by only those claimants who prevailed in appeals by employers from initial determinations in favor of the claimant, per claimant?

13. For the calendar year 1968, in how many of the appeals by employers from benefit determinations in favor of the claimant, where the employer prevailed, did the claimant fail to appear for the hearing before the referee?

14. For the calendar year 1968, in how many of the appeals by employers from initial determinations in favor of the claimant, where the claimant prevailed, did the claimant lose benefits, to which he would have otherwise been entitled, by failing to continue reporting to the employment office pending the referee's decision thereon?

15. For the calendar year 1969, in how many of the appeals by employers from benefit determinations in favor of the claimant, where the employer prevailed, did the claimant fail to appear for the hearing before the referee?

16. For the calendar year 1969, in how many of the appeals by employers from initial determinations in favor of the claimant, where the claimant prevailed, did the

claimant lose benefits, to which he would have otherwise been entitled, by failing to continue reporting to the employment office pending the referee's decision thereon?

17. For the calendar year 1968, in what percentage of all appeals, including both those filed by the employer, those filed by the employee, and those initiated by the then Department of Employment, was the employer represented by an attorney or other professional counsel, including independent firms engaged in the business of providing expert representation in regard to unemployment insurance matters?

18. For the calendar year 1969, in what percentage of all appeals, including both those filed by the employer, those filed by the employee, and those initiated by the then Department of Employment, was the employer represented by an attorney or other professional counsel, including independent firms engaged in the business of providing expert representation in regard to unemployment insurance matters?

19. For calendar 1968, in what percentage of all appeals, including both those filed by the employer, those filed by the employee, and those initiated by the then Department of Employment was the employee represented by either an attorney, a union official, or other professional counsel?

20. For calendar 1969, in what percentage of all appeals, including both those filed by the employer, those filed by the employee, and those initiated by the then Department of Employment was the employee represented by either an attorney, a union official, or other professional counsel?

Dated: February 24, 1970.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: JOHN DIAZ COKER /s/
John Diaz Coker
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Filed Dec. 22, 1969

In the United States District Court for the Northern District of California

Civil Action No. C-69 350 ACW

Judith Java and Carroll H. Hudson, individually, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually, and as Director of the California Department of Human Resources Development,
Defendants.

ANSWER TO INTERROGATORIES

The defendants answer the Interrogatories served on them by mail received November 25, 1969, as follows:

INTERROGATORY NO. 1:

Between January 1, 1969 and September 30, 1969, 768,445 claimants have filed new claims for unemployment insurance benefits.

INTERROGATORY NO. 2:

The department does not maintain records pertaining to the precise information asked for by Interrogatory No. 2. However, the department can provide the following statistics. Between January 1, 1969 and September 30, 1969, 669,162 new claims were filed by claimants found by the department to possess qualifying wage credits. In this same period, the department issued 513,590 determinations on eligibility. 295,276 of these determinations were favorable to the claimant. This figure represents the number of determinations and does not distinguish those instances in which more than one determination was made with respect to one particular claimant. In this same period, approximately 683,603 claimants were paid benefits, which figure includes some individuals filing new claims in the previous year of 1968. 505,796 were first payments on new claims. However, not all the individuals in this group necessarily filed new claims in 1969.

INTERROGATORY NO. 3:

Between January 1, 1969 and September 30, 1969, 50,857 claimants whose last employer filed protests were subsequently determined to be eligible for benefits.

INTERROGATORY NO. 4:

The department does not maintain records indicating the total number of all employer appeals, but only those which result in a decision. Between January 1, 1969 and September 30, 1969, 4,159 appeals to a referee were filed by employers which resulted in a decision. During this same period, 7,580 appeals were either dismissed or withdrawn, but no information is available to identify the number of these appeals attributable to an employer.

INTERROGATORY NO. 5:

The department does not maintain information reflecting the median length of time for all appeals filed by an em-

ployer, as distinguished from claimant appeals. However, the department can provide the following information. The median length of time between the date of filing and the date of mailing of the decision, or dismissal, for all referee cases for the period between January 1, 1969 and September 30, 1969 is 40.5 days.

INTERROGATORY NO. 6:

The department does not maintain records pertaining to the information sought by Interrogatory No. 6. However, note the answer to Interrogatory No. 7.

INTERROGATORY NO. 7:

The department does not maintain records pertaining to employer appeals as distinguished from claimant appeals. Nor does the department maintain records reflecting the information sought by Interrogatory No. 7 with respect to all appeals. However, based upon a sample of 1,526 cases of appeals by both claimant and employers, between January 1, 1969 and September 30, 1969, the median length of time elapsing between the hearing date and the mailing of the referee decision was seven days. This figure does not include dismissals.

INTERROGATORY NO. 8:

The records maintained by the department do not pertain to all appeals filed by an employer, but only those which result in a decision. However, of the 4,159 appeals filed by an employer between the period of January 1, 1969 through September 30, 1969, which resulted in a decision, 2,023 resulted in decisions which were favorable to the employer.

INTERROGATORY NO. 9:

The department does not maintain records reflecting the number of claimants appeals; rather, the department's records reflect only the number of appeals to referees filed by claimants which resulted in a decision. For the period of January 1, 1969 through September 30, 1969 this figure is 14,768.

INTERROGATORY NO. 10:

Of the 14,768 appeals to referees filed by claimants between January 1, 1969 and September 30, 1969 which resulted in a decision, 4,838 resulted in decisions which were favorable to the claimant.

INTERROGATORY NO. 11:

Between January 1, 1968 and December 31, 1968, 960,180 claimants filed new claims for unemployment insurance benefits.

INTERROGATORY NO. 12:

While the department does not maintain records reflecting the precise information sought by Interrogatory No. 12, it can make the following statement. In the year 1968, 818,224 new claims were filed by claimants with qualifying wage credits. Between January 1, 1968 and December 31, 1968 the department made 667,993 determinations on eligibility. 401,927 of these determinations were favorable to the claimant. It must be pointed out that this figure does not indicate the number of claimants involved in the 401,927 determinations. In this same period, approximately 824,361 claimants were paid benefits, of which approximately 623,976 were first payments on new claims. However, not all the individuals in this group necessarily filed new claims in 1968.

INTERROGATORY NO. 13:

Between January 1, 1968 and December 31, 1968, 70,414 claimants whose last employer had filed a protest were determined to be eligible for benefits.

INTERROGATORY NO. 14:

The department does not maintain records indicating the total number of appeals filed by employers to determinations of eligibility in favor of claimants; rather, it maintains records only of those employer appeals which result in a decision. Between January 1, 1968 and December 31, 1968, 5,526 appeals to referees were filed by employers which resulted in a decision.

INTERROGATORY NO. 15:

The department does not maintain the specific information sought by Interrogatory No. 15 with respect to appeals filed by an employer rather than a claimant. However, for all referee cases for the period of January 1, 1968 to December 31, 1968, the median length of time between the date of filing of the appeal and the date of the mailing of the decision or dismissal was 49 days.

INTERROGATORY NO. 16:

The department does not maintain the information sought by Interrogatory No. 16.

INTERROGATORY NO. 17:

The department does not maintain the information sought by Interrogatory No. 17.

INTERROGATORY NO. 18:

The department does not maintain information relating to the disposition of all employer appeals, but only to those

which result in a decision. Of the 5,526 appeals to referees filed by employers between January 1, 1968 and December 31, 1968, which resulted in a decision, 2,602 resulted in decisions which were favorable to the employer. It should be noted that it cannot be determined from the records maintained by the department how many claimants or employer appeals were involved in the 2,602 decisions since some decisions involve more than one claimant or employer appeal.

INTERROGATORY NO. 19:

The department's records reflect the results only of those claimants' appeals which result in a decision. Between January 1, 1968 and December 31, 1968, 20,983 appeals to referees were filed by claimants which resulted in a decision.

INTERROGATORY NO. 20:

Of the 20,983 appeals to referees filed by claimants between January 1, 1968 and December 31, 1968 which resulted in a decision, 7,079 resulted in decisions which were favorable to the claimant.

INTERROGATORY NO. 21:

Yes.

INTERROGATORY NO. 22:

The department maintains the following reports, copies of which are attached, pertaining to the information sought by Interrogatory No. 21:

1. New Claims Filed Against California, Years 1955-1969
2. New Claims With Qualifying Wage Credits—Total, Years 1955-1969

3. Rulings on Issues of Voluntary Quit and Misconduct Unfavorable for Most Recent Employer, Years 1955-1969
4. Decisions on Appeals to Referee Filed by Claimants (Number of Cases), Years 1955-1969
5. Decisions on Appeals to Referee Filed by Claimants Favorable (Number of Cases), Years 1955-1969
6. Decisions on Appeals to Referee Filed by Claimants—Unfavorable (Number of Cases), Years 1955-1969
7. Decisions on Appeals to Referee Filed by Employers (Number of Cases), Years 1955-1969
8. Decisions on Appeals to Referee Filed by Employers—Favorable (Number of Cases), Years 1955-1969
9. Decisions on Appeals to Referee Filed by Employers—Unfavorable (Number of Cases), Years 1955-1969
10. Appeals to Referee, Other Dispositions, Benefit Appeals Withdrawn or Dismissed (Number of Cases), Years 1955-1969
11. Nonmonetary Determinations—Total, Years 1955-1969
12. Number of First Payments Issued, Years 1955-1969
13. Benefit Disqualifications—Total, Years 1955-1969
14. Number of Unemployment Insurance Beneficiaries, Years 1965-1969

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Nicolo Pino
Nicolo Pino, Assistant
Chief Research and
Statistics

State of California
County of Sacramento—ss.

Nicolo Pino, being first duy sworn under oath does depose and state that:

1. He is the Assistant Chief of the Research and Statistics Section of the Department of Human Resources Development of the State of California and has in his possession and under his control the statistical records of the said Department of Human Resources Development relating to unemployment insurance claims filed, eligibility and disqualifications considered and the outcome thereof, appeals filed to referees of the California Unemployment Insurance Appeals Board and the outcome of said appeals.

2. He has in his capacity as Assistant Chief of the Research and Statistics Section of the Department of Human Resources Development subscribed to the foregoing Answer to Interrogatories and does state that the information contained therein is true and correct to the best of his knowledge and belief.

/s/ Nicolo Pino
Nicolo Pino,
Assistant Chief
Research and Statistics

Subscribed and sworn to before me this 16th day of December, 1969.

/s/ Sydney R. Johnson
Notary Public in and for
the State of California
[SEAL]

[STATISTICAL CHARTS OMITTED]
Pages 104-118

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In the United States District Court for the Northern District of California

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Judith Java and Carroll H. Hudson, individually, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually, and as Director of the California Department of Human Resources Development,

Defendants.

ANSWERS TO SUPPLEMENTAL INTERROGATORIES

The defendants answer the Supplemental Interrogatories dated February 24, 1970, as follows:

INTERROGATORY NO. 1

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 1.

INTERROGATORY NO. 2

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 2.

INTERROGATORY NO. 3

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 3.

INTERROGATORY NO. 4

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 4.

INTERROGATORY NO. 5

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 5.

INTERROGATORY NO. 6

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 6.

INTERROGATORY NO. 7

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 7.

INTERROGATORY NO. 8

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 8.

INTERROGATORY NO. 9

For the calendar year 1968, the arithmetic mean number of weeks of benefits received by all claimants filing valid new claims for unemployment insurance was 10.1 weeks, while the median number of weeks was 7.4 weeks.

INTERROGATORY NO. 10

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 10.

INTERROGATORY NO. 11

For the calendar year 1969, the arithmetic mean number of weeks of benefits received by all claimants filing valid new claims for unemployment insurance was 9.4 weeks, while the median number of weeks was estimated to be 7.0 weeks.

INTERROGATORY NO. 12

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 12.

INTERROGATORY NO. 13

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 13.

INTERROGATORY NO. 14

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 14.

INTERROGATORY NO. 15

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 15.

INTERROGATORY NO. 16

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 16.

INTERROGATORY NO. 17

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 17.

INTERROGATORY NO. 18

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 18.

INTERROGATORY NO. 19

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 19.

INTERROGATORY NO. 20

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 20.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 13, 1970

/s/ GEORGE ROCHE
George Roche, Chief
Research and Statistics
Section, Department of
Human Resources
Development

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In the United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA, et al.,
Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

STIPULATION

I. At least since 1948 (earlier records are in storage) the Department of Human Resources Development (formerly Department of Employment) has paid out unemployment compensation benefits to claimants immediately after such claimants have been determined eligible by a determinations interviewer. In the payment of unemployment compensation benefits, there is no delay attributable to the period in which a claimant's last employer may file an appeal. However, if an eligibility determination is appealed by an employer during the statutory 10-day period, the payment of benefits is stayed pursuant to Section 1335 of the Unemployment Insurance Code. In the usual case in-

volving an appeal by an employer, a claimant receives no more than two payments during this period. The claimant may receive additional payments in the event that an employer files a late appeal.

II. The sections of the local office manual submitted herewith are stipulated by the parties to be those sections which are relevant to these proceedings. Plaintiffs draw particular attention to Section 1400.1, 1400.2, 1400.25, 1400.3 (1-3), 1400.5 (1-3), 1404.2, 1404.4 (8-23), 1404.6 (1-4). In addition to the foregoing sections, defendants call attention to sections 1400.3 (4, 6), 1400.65, 1400.7, 1400.8, 1404.6 (10-11), 1472 (1-5, 13), 1474, 1507.6, 1509.1.

III. The contents of the April 7, 1970 memorandum of Thomas Griffin, attached to the claims forms submitted herewith, has been reviewed and agreed upon by the parties.

Dated: April 14, 1970.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: STEPHEN P. BERZON /s/
Stephen P. Berzon
Attorneys for Plaintiffs

Dated: April 14, 1970.

THOMAS C. LYNCH,
Attorney General
By: ASHER RUBIN /s/
Asher Rubin
Attorneys for Defendants

1400.1 PURPOSE OF DETERMINATION PROCESS

1. The determination is the point at which any issue affecting the clmnt's eligibility is decided and fulfills the Department's legal obligation to insure that:

a. Benefits are paid promptly if clmnt is eligible.

b. Benefits are denied promptly if clmnt is ineligible.

2. A secondary aspect of the determination process is to consider, when so requested by an Er, the circumstances surrounding a clmnt's separation from that Er and to rule whether or not the Er will be relieved of any charges to his account resulting from benefits drawn by that clmnt.

1400.2 WHEN DETERMINATION REQUIRED

1. A determination must be made promptly if there is any question of eligibility for weeks claimed or paid, except:

a. FS determination will be made only after the claimant is interviewed or admits wilful FS, except when:

(1) Employer demands immediate determination on FS issue, *or*

(2) The benefit year has ended, and (a) a desk cert is on file, or (b) the FS issue would affect benefits that have been paid.

b. No determination will be made until the claim is declared valid.

(1) When a 429 or 455 is sent to recompute an invalid claim, or a 4456 is sent for CO vertification, make a determination, if necessary, but do not tally it or release any written decisions unless the claim becomes valid.

(a) If claim is active, interview claimant and hold 2403 pending validity of claim.

(b) If claim is inactive, put 1173 in deck pending validity of claim.

2. When no benefits have been claimed since a potentially disqualifying act or situation and the claim is inactive, defer the determination until clmnt next reports — unless the Er specifically requests an immediate determination.

3. A determination on a separation issue can only be made in connection with a clmnt's last Er. A determination previously made on a separation from an incorrect last Er is null and void and may be corrected anytime within the BY.

1400.25 WHEN RULING REQUIRED

When an employer submits timely written information that a claimant was discharged from his employ or that a claimant quit, make a ruling promptly after making every attempt to contact claimant for his statement.

1400.3 THE DETERMINATION

1. You are responsible for making determinations which conform to the law, regulations, policy and precedent as officially released by the Department.

a. Use the BDG as a reference. If point of reference not contained there, refer to the Index Digest. In the event of conflict between references and written procedure, request clarification from Area Office.

b. Division Notices take precedence over existing procedure until such time as appropriate manuals are amended.

c. Use Fact-Finding Guide Sheets in BDG to facilitate the determination interview.

2. You have the authority and responsibility to seek from any source the facts required to make a prompt and proper determination of eligibility.

a. If necessary to obtain information by mail from any source, the determination may be placed in suspense for 10 days from date of interview. If no reply is received, the determination must be made on the facts available and no later than the clmnt's next report day.

3. You are not required to sign 2403 for a determination you do not make; however, your supervisor has authority to require that your determination conforms to standards.

4. Notices of determination and/or ruling must be issued promptly.

a. Within one week of date of interview if all facts obtained by interview.

b. Within one week of suspense date if facts obtained by mail.

c. Any exception to this standard must be approved by supervisor.

• • • • • • • •

6. Advise disqualified clmnt of his reporting requirements and his rights to appeal so that he may protect his rights under the law.

1400.5 THE RULING-ONLY

1. Ruling decisions are based on facts obtained from Er and clmnt together with any other information obtained by the Department.

a. Whenever information submitted is not clearly adequate to substantiate a decision, the Department has an obligation to seek the necessary information.

2. Er and/or clmnt must be offered opportunity to confirm, contradict, refute or explain any evidence which is:

a. Inconsistent with information previously received from him, *or*

b. Adverse to his interests.

3. If Er protest and other available information does not clearly resolve issue, Er must be given an opportunity to provide additional information.

1400.65 FILING IN APPEAL

1. Interviewers may assist appellants to complete appeal forms only when it would be unduly difficult for appellant to complete them or have them completed.

2. Appeals on determinations or ruling-determinations must be transmitted to the referee office that serves the local office within one working day of their acceptance in the LO. Transmittal shall not be delayed for additional fact-finding or verification by the preappeal reviewer.

1400.7 PREPARING DETERMINATION, RULING, AND APPEAL FORMS

Interviewers will prepare notices of determinations, 1080 series; notice of rulings, 4454; appeal to referee, 1000 series; appeal to referee transmittal, 4868; appeal to Appeals Board, 1253; and requests for withdrawal of appeal, 1011; by hand if their handwriting is legible. If an interviewer is unable to improve his handwriting enough to be acceptably legible the manager may authorize typing of that interviewer's forms. Typing of notices of determinations, rulings, appeals to referee, appeals to referee transmittals, appeals to Appeals Board, or requests for withdrawal of appeal will not be established office policy.

1440.8 PULLING CORRESPONDENCE FOLDERS

1. Whenever determination, ruling, or appeal action is required, the appropriate fiscal year correspondence file is pulled.

2. Whenever any formal or informal evaluation of the determination or ruling process is made, the correspondence folder is pulled.

1404.2 PRELIMINARY REVIEW

1. Prior to calling clmnt, review available documents and substantiate need for determination.

a. Determination is needed if Er has protested clmnt's eligibility or if facts are present which indicate clmnt may be ineligible to receive benefits.

2. If appropriate correspondence folder not with claim jacket awaiting interview and 1101J (or 1101ED) noted that folder is used with another claim scheduled that day, locate folder on interviewer's desk, at refile, or in correspondence file.

a. If other interviewer has completed his actions, pull folder.

b. If other interviewer has not completed actions, pull correspondence from folder.

3. Plan line of questioning which will develop facts necessary to a proper decision.

4. Review reference material, if necessary.

1404.4 CONDUCTING INTERVIEW

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8. Explain need for interview and tell clmnt in a general way what information will be required from him. Explain

that the required information may concern matters which are of a very personal nature but which are essential to properly determine his eligibility for benefits.

9. Review CEP and complete items in accordance with instructions in Sec 1615.4.

10. Verify clmnt's most recent Er on all separation issues.

11. Complete identifying items at top of Record of Claim Status Interview, DE 2403.

12. Review 4935. If a separation issue is to be resolved and clmnt has not completed a 4935, have him complete it before continuing with the interview. If it is impossible for the clmnt to complete the form or have someone complete it for him, the interviewer shall complete it. A note should be made on the 4935 that the statements were recorded by the identified interviewer. Be sure it is dated and signed.

a. Clarify or verify any questionable statements.
   (1) Record information on 2403.
b. Check 4935 block on 2403.

NOTE: Under no circumstances make entries on 4935 after clmnt has signed it.

13. Permit clmnt to offer his own explanation of facts relative to the issues.

14. Review any notification of separation submitted by the clmnt or Er.

a. Record pertinent information on the 2403.
b. Return the notification to the clmnt or ER unless it is a copy in which case retain it as a part of the determination file.

15. Obtain additional information from clmnt by asking specific questions.

16. Record pertinent information obtained from clmnt under "Finding of Facts" on 2403.

a. Do not repeat information on the 2403 which already appears on 4935.

b. Staple 4935 and other pertinent documents to 2403.

17. Obtain necessary information from Er, union, or other sources as applicable.

a. List the name and position of person spoken to.

18. Record all pertinent facts.

a. Record background and general facts only as necessary to an understanding of conditions which are not documented.

19. Review Facts.

20. Question clmnt regarding any inconsistent or improbable facts. Verify, if necessary, by contacting logical sources of information.

a. Tell clmnt that verification of his representations will be made.

b. If possible, make telephone contact with other parties at time of determination interview. If the person is not available, contact him as soon as possible. Contact parties outside the immediate area by letter. Advise clmnt of reason for delay.

c. Record results of verification showing source and name of person.

(1) Show efforts to verify if verification unsuccessful.

21. Permit interested person(s) to confirm, contradict, refute, or explain any evidence which:

a. Is inconsistent with information previously received from that person.

b. Is adverse to his interests.

c. Raises a new issue.

22. Record results of rebuttal on 2403 showing:

a. Facts obtained.

b. Which assertion was determined to be correct and reasons for reaching this conclusion.

c. If interested party was given opportunity for rebuttal but was unable or unwilling to do so.

23. If additional facts, verification, clarification or rebuttal are needed from Er *and* contact cannot be made by telephone, prepare 4463. See 1428, DETERMINATION WHEN CLAIMANT NOT AVAILABLE FOR INTERVIEW.

1404.6 CONCLUDING INTERVIEW

1. Review facts with clmnt and ask him if he has anything further to add.

a. Record additional information (if pertinent) on 2403.

2. Decide clmnt's eligibility.

3. Tell clmnt in courteous, nontechnical language the reason for decision.

4. If decision is to be delayed, tell clmnt why.

a. If clmnt gives more pertinent information, record on 2403 and review decision in light of new information.

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10. When 1080 is handwritten enter the final date an appeal can be filed.

a. Compute final date for filing appeal by excluding date of service to clmnt and including the 10th day unless it it a Saturday, Sunday, or holiday. In this event, extend time to next working day.

11. Advise clmnt of his appeal rights and appeal rights of Er.

1472 PROCESSING, REGISTERING APPEAL

Process appeals within one working day of receipt even though untimely or reconsideration pending. If later reconsideration reverses decision, appeal is withdrawn. (See 1490.2, SUPPLEMENT, in routing appeals to referee.)

1. Review appeal form for completeness, accuracy and signature.

2. Attempt to insure that grounds for appeal are stated —that appellant explains why he thinks the decision is not proper.

3. Complete items 8, 9 and 10 as appropriate and check the block for type of appeal. If appeal by letter, enter in item 3: "Refer to appellant's letter of (date)".

   a. If apparent that interpreter needed at hearing, enter under item 8: "NOTE: (language) speaking interpreter needed at hearing."

4. Print in red on 1101J and 1101R, if applicable, "Appeal (date)" using two spaces of LO Notes. If payment withheld, indicate ending date of disq or potential disq on 1101R. Post DC's to 1101R if applicable and PER schedule. If Er appeal, enter in first grid of 1101J: "Stop—appeal".

5. Complete DE 4868, Appeal to Referee Transmittal, by hand. List all items to be forwarded to referee and check for those to be duplicated and returned to LO.

   a. Forward original and two copies of DE 1000 and all related documents to referee.
   b. Do not send original 1101, 1190 or 2451. If needed, send copy.
   c. If appeal from DE 4614, Notice of Denial or Cancellation of Ruling or Determination, send all documents relating to merits of original ruling.
   d. If timeliness of Er protest verified by 733 from CO Acctg Sec, send it to referee.

e. If appeal from clmnt FS disq, send all basic documents relating to FS to referee including 1426, 4935, 4581, 2402. If FS on 1101, 1190 or 2451, make copy.

f. Send 1426 in all separation cases and where items listed on 1426 relate to issue under appeal.

g. Ask for duplicate copies of documents LO will need for presentation of case at hearing, reconsideration of AA issue prior to hearing, and those necessary to evaluate pre-appeal review and referee's decision.

h. If more than one copy of document is needed, the request is submitted to Duplicating Unit by the use of DE 1862, Photocopy Work Order. Copies are not ordered for clmnts, Ers or their agents. Such requests should be referred to the referee.

i. Order copy of 2403 in all cases except TD.

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13. If Er appeals decision holding clmnt eligible, send clmnt copy of decision with DE 4944.

1474 PROCEDURE DURING PERIOD OF APPEAL

Special rules apply to claims actions during the appeals period which begins when the determination under appeal is effective and continues until the referee or Board decision is recieved or any potential disq is served or purged.

1. When clmnt contacts LO regarding an appeal on eligibility filed by Er explain that benefits cannot be paid for weeks involved in appeal.

a. Tell clmnt to certify for each week for which he desires to claim benefits.

(1) Explain that benefits may be paid if decision in his favor.

b. Explain requirements for purging or lifting potential disq.

2. Accept certifications for weeks of unemployment but do not process an AC during the effective period of potential disq by the referee.

3. Consider and resolve:

a. Any new issue which arises while clmnt certifying during period of appeal.

1507.6 OP RESULTING FROM APPEAL DECISION

1. Do not contact clmnt when OP results from Appeal Decision.

a. Issue 1444, but no 1080 OP. Clmnt has received decision.

b. Convert any desk certs representing withheld benefits pending appeal decision to 826F offsets if clmnt otherwise eligible. See Sec 1504.3, COLLECTION BY OFFSET.

c. If OP balance remains after any desk certs representing withheld benefits are converted to offsets, consider waiver of balance. See Sec 1509 WAIVERS.
   (1) Do not waive if Referee or Board finds clmnt liable for OP.

d. If appeal from OP results in decision increasing the amount of OP, see Sec 1510.3, PROCESSING APPEAL DECISIONS.

2. Do not establish OP if Board disqs clmnt after both LO and Referee have held clmnt eligible. This is a double affirmation, and therefore no benefits were erronerously paid.

1509.1 WAIVER STANDARDS

Determine whether to recoup or waive an OP pursuant to the following standards. Do not allow considerations of

sympathy or clmnt's financial status to influence the determination.

1. Clmnt *is liable* and recoupment is required if:

a. Clmnt made FS or withheld material facts in order to draw benefits.

b. There is some fault on the part of the clmnt in the payment of benefits. For example:

(1) Clmnt did not report refusal of work or referral and 1173 was not filed with the claim prior to payment.

(2) Clmnt accepted payment after he had received written or verbal notice of disq, and it is reasonable that he knew payment was in error.

c. In all of the following without regard to question of fault:

(1) Duplicate benefits for a single week.

(2) Back pay award for wages that would have been paid if clmnt had worked. See Sec 1508.2, BACK PAY AWARD.

(3) FEPC award in lieu of wages. See Sec 1508.3, FAIR EMPLOYMENT PRACTICES COMMISSION (FEPC) WAGE AWARD.

(4) Temporary Total Disability Indemnity under Workmen's Compensation for same period benefits paid. See Sec 1508.1, WORKMEN'S COMPENSATION.

(5) Referee or Board finds clmnt liable for OP.

2. Clmnt is *not liable* and waiver is proper because there is no fault on part of clmnt when OP is result of:

a. Redetermination made to correct previous determination where both determinations are based on *same* facts.

b. Reversal by Referee or Appeals Board of determination allowing WP or benefits when decision is based on *same* facts.

c. Modification of LO determination by Referee or Appeals Board which increases disq and creates or increases OP if decision is based on *same* facts.

d. LO determined claim to be valid under Sec 1277 when processing 4456 but later found that 4456 was in error and claim invalid although wage information supplied by clmnt was correct.

3. To determine whether to waive or recoup in other than the specific situations outlined above, following standards should be applied:

a. Waiver is proper if clmnt is entirely without fault and benefits were paid in error.

b. Recoupment is required if benefits were received due to error but the clmnt knew the error was being made and did not say anything about the error (the clmnt is at fault).

4. Do not waive OP on claim which is going to be established by another state. See Sec 1508.4, INTERSTATE OP. Waiver decisions on these cases will be made by Chief of Benefits.

Memorandum Prepared by California Department of Human Resources Development

PROCEDURAL STEPS IN FILING AND PROCESSING A CLAIM FOR UNEMPLOYMENT INSURANCE BENEFITS

I. The claimant files a new claim for unemployment insurance benefits.

A. The claimant *submits* the following documents:
   1. A form DE 1101 (New Claim), a four-part form (Exhibit 1).
      a. The original copy is forwarded to the headquarters office of the department for a computation of the claimant's weekly and maximum benefit amounts.
      b. The second and third copies, joined together, are mailed to the claimant's last employer as indicated by the claimant on the date that the claim is filed.
         (1) The second copy is for the employer's files.
         (2) The employer is required to return the third copy to the local office within 10 days with information relating to the claimant's eligibility for benefits.
      c. The fourth copy is retained by the local office in which the claim is filed.
   2. A form DE 1426 (Initial Claim Statement, Exhibit 2). This document is reviewed for completion at the time the DE 1101 is filed and is retained by the local office for a later, more detailed, review at the eligibility Benefit Rights Interview (See 2, below).

B. The claimant *is given* the following documents:
   1. A form DE 1275A (Unemployment Insurance Handbook for Claimants, Exhibit 3), with at least page 16 completed.
   2. A form DE 4681A, DE 4681B, or DE 4681C (Seek Work Plan, Exhibit 4A-C), whichever is applicable to the claimant.

3. A form DE 3893 (Claimant Profile, Exhibit 5). The claimant is instructed to complete the document and return it to the department at the time of the Eligibility Benefits Rights Interview.
4. If either the answer to question No. 8 on the DE 1101 (see step 1.A.1, above) or the answer to question No. 12 on the DE 1426 (see step 1.A.2, above) indicate a potential issue of eligibility because of the circumstances surrounding the claimant's leaving of his last employment, he is given a copy of the form DE 4935 (Claimant's Separation Statement, Exhibit 6) with the instructions to complete the document and return it to the department at the time of the Eligibility Benefit Rights Interview (See 2, below).
5. Two copies of form DE 4581 (Continued Claim Statement, Exhibit 7). The dates of the Saturday of the first and second weeks following the effective date of the claim, respectively are stamped on the cards. The claimant is instructed to return the completed cards at his Eligibility Benefit Rights Interview so as to certify to his eligibility for benefits for each week.

C. The department completes the heading on the following document:
   1. A form DE 1101J (Exhibit 8), an envelope into which is placed the office copy of the DE 1101 (see item 1.A.1., above) and the DE 1426 (see item 1.A.2., above).

D. The claimant is scheduled to return to the office in the third week following the effective date

of his claim for the purpose of receiving an Eligibility Benefit Rights Interview and for the purpose of certifying for and receiving benefits for the second week following the effective date of his claim.

II. The Eligibility Benefit Rights Interview.

When the claimant returns to the local office for his Eligibility Benefit Rights Interview, the interviewer reviews with the claimant his answers on the DE 1101 (New Claim), the DE 1426 (Initial Claim Statement), the DE 3893 (Claimant Profile), the DE 4935 (Claimant's Separation Statement) if any, and any employer response on the second copy of the DE 1101.

A. If no issue arises from the circumstances surrounding the claimant's leaving of work, the claimant is advised as to methods of seeking work which are likely to be productive for him.

B. If an issue arises as to the claimant's eligibility, either from his answers on one of the documents or because of information submitted by the last employer, a formal determination is made as to the claimant's eligibility. Information received from any source is summarized by the interviewer on a form DE 2403 (Record of Claim Status Interview, Exhibit 9).

(1) If the claimant is disqualified from or held ineligible for benefits, he is served personally or mailed a copy of the form DE 1080 (Notice of Determination, Exhibit 10).

(2) If the claimant is held eligible for benefits, he is given credit for a waiting period of one week following the effective

date of his claim and is paid for the first compensable week of unemployment which is the second calendar week following the effective date of his claim. If the eligibility issue arose because of information submitted by the claimant's last employer, that employer is mailed a form DE 1080E (Notice of Determination, Exhibit 11). If the claimant continues to draw benefits, he is given a form DE 2402 (Periodic Questionnaire, Exhibit 12), approximately every 5 weeks in lieu of the form DE 4581 (Continued Claim Statement) for that particular week.

III. The Appeal.

A. If the claimant is disqualified from or held ineligible for benefits, he may file his appeal with the local office or a referee office on a form DE 1000 (Appeal To A Referee, Exhibit 13). This form is suggested and preferred but appeals filed by way of a letter or another form are processed as valid appeals.

B. If the claimant is held eligible for benefits, the employer may appeal using the same form DE 1000 (Appeal To A Referee) although, again, the use of this form is not mandatory. In the event of an employer appeal, a copy of the DE 1080E which was previously sent to the employer, is now mailed to the claimant with a cover letter form DE 4944 (Transmittal Of Amended Determination, Exhibit 14).

In The United States District Court For The Northern District Of California

CASE NO. C-69 350 ACW

Filed May 14, 1970

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,

Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield as Director of the California Department of Human Resources Development; Esther Perry, as Manager the Pittsburg, California branch of the California Department of Human Resources Development; Ramon L. Jimenez as Manager of the Richmond, California branch of the California Department of Human Resources Development,

Defendants.

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

BEFORE: JERTBERG, U. S. Circuit Judge; and ZIRPOLI and WOLLENBERG, District Judges.

This is a challenge, on both statutory and constitutional grounds, to certain aspects of the California unemployment compensation program. This program, certified by the Secretary of Labor under the provisions of the Social Security Act (42 U.S.C. § 503), provides for the payment of

insurance benefits, over an extended period of time, to persons who find themselves unemployed "through no fault of their own". Calif. Unempl. Ins. Cde. § 100. These payments begin after an initial determination of eligibility by an eligibility interviewer who is directed to consider all information submitted by the claimant, his former employer, and others. Calif. Unempl. Ins. Cde. §§ 1326 et seq. If this initial determination is favorable to the claimant, payments begin immediately. The employer, however, is then given ten days in which to appeal; if an appeal is filed, benefits are stopped pending decision on the appeal without any provision for a pre-termination hearing. Calif. Unempl. Ins. Cde. § 1335. It is this statutorily directed stoppage of benefits without prior notice and hearing which is under challenge by plaintiffs.

Plaintiffs' argument is three-fold. First, it is said that since the median delay in resuming payments after an employer has invoked § 1335 is about seven weeks, the California program conflicts with certain clearly defined national and state goals. The California scheme is intended to stave off extreme personal hardship as well as society-wide depression in times of increasing unemployment. See Calif. Unempl. Ins. Cde. §§ 100-101. This end is clearly thwarted when a claimant must wait some fifty days for payments to resume. Second, the California statute is said to violate the federal law which directs that state unemployment compensation programs must be "reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1). Third, it is argued that the denial of benefits, without a prior hearing, to persons who have already been found initially eligible for such benefits violates plaintiffs' rights to due process of law under the federal constitution. Most relevant to this is the Supreme

Court's recent decision in *Goldberg v. Kelly,* ..... U. S. .....(1970).

The constitutional aspects to this challenge to § 1335 warranted the appointment of a three-judge court. 28 U.S.C. § 2284.

Plaintiffs' three arguments are, in fact, nearly co-extensive. The "payment when due" directive of the Social Security Act is indicative of a congressional desire to help the jobless when they need it most. It can also be read as a reiteration of the classic due process standard, i.e. when a person has been found entitled to a government benefit, this benefit in most cases cannot be taken away without certain pre-termination procedures being followed.[1] It seems best, therefore, to analyze the operation of the California system in order to determine when an individual claimant is "entitled" to unemployment compensation. If payments are "due", deprivation of those payments without a prior hearing would raise questions under both the federal statute and the Constiution. Most simply, when is "when due"?

The parties herein have entered into a stipulation which does much to clarify the actual practices of the State Department of Human Resources Development. A claimant for unemployment insurance benefits must initially file Forms DE 1101, 1426 and 3893. These forms, taken together, apprise the eligibility interviewer of the basis of the claim, the name of the claimant's previous employer, the reason for his no longer working, his work experience, and so on.

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1. An entitlement to unemployment insurance benefits or welfare payments is no different from the due process standpoint than an entitlement to a pension, or a farm subsidy, or a professional license to practice. Once a person's qualification for the benefit is shown, it cannot be arbitrarily denied, or withdrawn, without due process standards being fulfilled. See *Goldberg v. Kelly, cit. supra,* note 8; and Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L.R. 1439 (1968).

The question most frequently basic to disputed cases, i.e. the claimant's reasons for no longer working, is answered on DE 1101 and copies of this form are immediately sent to the previous employer for verification. The employer is then bound to submit, within ten days, "any facts then known which may affect the claimant's eligibility for benefits". Calif. Unempl. Ins. Cde. § 1327. If the employer raises an issue as to eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job.

All of this tends to show that the eligibility interviewer has at his disposal information from both employer and claimant prior to the "Eligibility Benefit Rights Interview", at which he speaks personally with the claimant. The interviewer has, according to the Local Office Manual used in California, the duty "to seek from any source the facts required to make a prompt and proper determination of eligibility". The actual decision may be suspended an additional ten days to get further information. If employer statements leave certain questions unresolved, the employer "must be given an opportunity to provide additional information". L.O.M. §§ 1400.3; 1400.5. At the interview itself, the interviewer is told to make "telephone contact with other parties . . . ." if at all possible. L. O. M. 1404.4. Interested persons must be allowed to "confirm, contradict, refute, or explain any evidence [which is relevant]". L.O.M. § 1404.4.

The eligibility interviewer must, then, consider the evidence presented by all sides and make a "determination" on "determination ruling" as to eligibility. There seems little question that this is the critical point in the California procedure. The Department itself proclaims that "[t]he determination is the point at which any issue affecting the

claimant's eligibility is decided and fulfills the Department's legal obligation to insure that [b]enefits are paid promptly if claimant is eligible". L.O.M. § 1400.1. Payments begin upon this decision, and for 95% of claimants, no further problem arises as to initial eligibility.

Defendants, however, argue that payments are not in fact "due" until another ten days passes without the employer appealing. This flies in the face of actual Department practice, which is to begin payments immediately upon the initial determination of eligibility and to stop them later upon an employer appeal.[2] The appeal Form DE 1000, upon being filed, halts payments. No hearing is held; no chance is given the claimant to rebut, even in writing, new information offered by the appellant. It is clear that in California payments become "due", and are paid, upon the favorable decision of the eligibility interviewer. It is only subsequently, generally after two payments have been made, that an employer appeal will result in automatic stoppage.

"When due" is, then, upon the initial determination of eligibility. At that point, all parties have been heard, evidence has been collected, and an adjudication made. This being the case, California's provision allowing benefits to be stopped without any pre-termination procedures raises serious due process questions. And the continued arrest of payments for a median period of seven weeks similarly causes doubt as to whether California's program is "reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1).

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2. "At least since 1948 . . . the Department of Human Resources Development . . . has paid out unemployment compensation benefits to claimants immediately after such claimants have been determined eligible by a determinations interviewer". Parties' Stipulation, filed April 14, 1970.

This Court finds the present case indistinguishable from *Goldberg v. Kelly cit. supra.* See also *Wheeler v. Montgomery,* ..... U.S. ..... (1970). *Goldberg* challenged the right of a State to terminate welfare benefits without a prior evidentiary hearing at which the recipient is given the chance to confront adverse witnesses and present his own evidence, verbal or written. As here, the defendants in *Goldberg* argued the State's interest in protecting public funds. The Supreme Court, balancing this interest against the interest of the welfare recipient in having the necessities of life while the bureaucracy mulls over his continued eligibility, found the fiscal argument somewhat weak, and rejected it. Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster stricken that there is someone, somewhere, worse off than he, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in *Kelly v. Wyman,* 294 F. Supp. 893 (1968), and the garnishee in *Snaidach v. Family Finance Corp. of Bay View, et al.,* 395 U.S. 337 (1969).

Further, the defendants' efforts to distinguish this case from the constitutional reasoning of *Kelly* and *Snaidach* only serve to point up the validity of the statutory grounds argued by plaintiffs. The most fundamental purpose of both the federal and the state unemployment compensation laws is "to *prevent* the burden of injured employees becoming charges upon society". *Abelleira, et al. v. The District Court of Appeal, etc.,* 17 C.2d 280, 300 (1941); Calif.

Unempl. Ins. Cde. §§ 100-01.[3] Defendants urge that public assistance is available to plaintiffs, but Congress, in enacting the Social Security Act, has found that the dole is often inadequate and always humiliating. This was certainly the primary reason for 42 U.S.C. § 503(a)(1) and the requirement that State programs assure full payment of benefits "when due". Yet some five thousand *eligible* recipients each year in California find their payments halted for a median period of seven weeks. Since the average period of unemployment in California is, according to uncontested argument before this Court, some nine weeks, it is clear that as to these people, payments are not made "when due", and the fundamental intent and policy of the Social Security Act are thwarted.

Accordingly, this Court finds Calif. Unempl. Ins. Cde. § 1335 defective on both constitutional and statutory grounds. By not providing for a pre-termination hearing, it runs counter to the principles enunciated in *Goldberg v. Kelly, cit. supra.* And by being applied so as to result in a median seven week delay in payments to claimants who have been found eligible for such payments, the California statute violates the directive of 42 U.S.C. 503(a)(1).

Therefore, IT IS HEREBY ORDERED that defendants, their successors in office, agents, and employees, be, and are, enjoined, during the pendency of this action, from

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3. The total inadequacy of locally administered charity in times of nation-wide cyclical unemployment led sponsors of unemployment insurance legislation to urge upon Congress a purely federal scheme. Political and legal considerations resulted, however, in the present federal-state setup, with the federal government imposing many standards to be followed by the States. Among these standards was the requirement of payment of claims "when due". On the legislative history, see generally Witte, *Development of Unemployment Compensation,* 55 Yale L.J. 21 (1945). See also Note, *Charity vs. Social Insurance in Unemployment Compensation Laws,* 73 Yale L.J. 334 (1963); *Rivard v. Bijou Furniture Co.,* 27 A 2d 853 (1942); *Steward Machine Co. v. Davis,* 301 U.S. 548, 586-87 (1937).

enforcing that part of Calif. Unempl. Ins. Cde. § 1335 which provides that "[i]f an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision". Defendants, their successors in office, agents, and employees, shall not suspend unemployment benefits due plaintiffs and members of their class on the ground that an eligibility determination has been appealed except after a prior hearing in accordance with the principles enunciated in *Goldberg v. Kelly, cit. supra.*

Execution of this Order will be stayed ten (10) days from the date of its filing. Any further stay will be granted only upon a proper motion and showing by defendants.

Dated: April 11, 1970

/s/ GILBERT H. JERTBERG
United States Circuit Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

/s/ ALBERT WOLLENBERG
United States District Judge

Supreme Court of the United States

No. 507 ----- , *October Term, 19* 70

California Department of Human Resources Development, et al.,

Appellants,

v.

Judith Java, et al.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 26, 1970